In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. ---------.

MID-VALLEY PIPELINE COMPANY,

Appellant,

vs.

DONALD R. KING, COMMISSIONER OF REVENUE,

Appellee.

MID-VALLEY PIPELINE COMPANY,

Appellant,

vs.

THOMAS D. BENSON, COMMISSIONER OF REVENUE,

Appellee.

(Three cases)

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it contends that the United States Supreme Court has jurisdiction on direct appeal to review the final decision and judgment of the Supreme Court of Tennessee, entered August 23, 1968, affirming a judgment of the Chancery Court of Davidson County, Tennessee.

The Supreme Court of Tennessee held that as applied to appellant, which is engaged exclusively in interstate commerce—solely in the interstate pipeline transportation of crude oil from origin points south of Tennessee to des-

tinati[illegible]n points north of Tennessee, the imposition of franchise and excise taxes upon appellant did not violate the Commerce and Due Process Clauses of the United States Constitution. Appellant submits that the United States Supreme Court should exercise its jurisdiction in this case to correct the decision of the Supreme Court of Tennessee.

OPINIONS BELOW.

Three cases instituted by appellant were consolidated for trial in the courts below. In two, Donald R. King as Commissioner of Revenue of Tennessee, was named defendant and in the third case his successor, Thomas D. Benson as Commissioner of Revenue of Tennessee was the defendant.

The opinion of the Tennessee Supreme Court is officially reported at _____ Tenn. _____ and unofficially reported at 431 S.W. 2d 277. Copies of the opinion and of the judgment of that Court are attached hereto as Appendix A and Appendix B, respectively. Copies of the opinion of the Chancery Court of Davidson County, Tennessee, dated February 1, 1968 (not reported) and of the judgment entered by that Court on February 29, 1968, are attached hereto as Appendix C and Appendix D, respectively.

JURISDICTION.

(i) In May, 1965, the then Commissioner of Revenue of Tennessee demanded in writing that appellant file franchise and excise tax returns under Chapters 29 and 27, respectively, of Title 67, Tennesee Code Annotated, for the taxable year 1963 and 1964, asserting that appellant was liable for such taxes for such years, and annually thereafter. Appellant filed the demanded returns and paid the

franchise and excise taxes to the Commissioner of Revenue under protest asserting that the imposition of the same violated the Commerce and Due Process Clauses of the United States Constitution. In accordance with the applicable Tennessee statutes appellant filed suit in the Chancery Court of Davidson County, Tennessee for recovery of the taxes and interest.

(ii) In like manner appellant filed franchise and excise tax returns with the Commissioner of Revenue for the years 1965 and 1966 under similar protests and paid those taxes under similar protests and for each year filed a petition for the recovery of such taxes in the Chancery Court for Davidson County, Tennessee. The cases involving the aforesaid taxes for the years 1963 to 1966, inclusive, were consolidated for trial in said Chancery Court and likewise were consolidated on appeal in the Supreme Court of Tennessee.

(iii) The said Chancery Court in a memorandum opinion, dated February 1, 1968 (Appendix C hereto) held the imposition of the franchise and excise taxes to be lawful and by journal entries, dated February 29, 1968 (Appendix D hereto) dismissed appellant's petitions. The appeal to the Supreme Court of Tennessee was allowed to appellant in the aforesaid journal entries of the Chancery Court.

(iv) The Tennessee Supreme Court in an opinion dated August 23, 1968, affirmed the determination of the Chancery Court and judgment was entered accordingly (Appendix A and Appendix B hereto). Notice of appeal was filed by the appellant with the Tennessee Supreme Court on November 4, 1968.

(v) The jurisdiction of the United States Supreme Court to review the decision and judgment of the Ten-

nessee Supreme Court is conferred by 28 U.S.C., Sec. 1257, which reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) 'By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' "

(vi) Cases which sustain the jurisdiction of this court to entertain an appeal under the quoted statute include the following:

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S. Ct. 396 (1954);

Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 74 S. Ct. 558 (1954);

National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753, 87 S. Ct. 1396 (1967);

The case at bar falls squarely within 28 U.S.C., Sec. 1257.

(viii) Appellant contends that Chapters 29 and 27 of Title 67, Tennessee Code Annotated imposing franchise and excise taxes, respectively, on foreign corporations are invalid and unconstitutional insofar as they have been construed by the Tennessee court to be applicable to appellant.

Appellant is engaged exclusively in interstate commerce. There is in this case an absence of any local activities of appellant in the State of Tennessee which may properly be regarded as sufficiently "separable from" its physical operation of an interstate crude oil pipeline. There is

no "nexus" to permit the imposition of a Tennessee "privilege" tax. No question as to the proper amounts of the franchise and excise taxes for the several years involved in this case, or the method of calculation thereof, are presented by this appeal.

The pertinent portions of Chapters 29 and 27 of Title 67, Tennessee Code Annotated are attached hereto as Appendix E.

(ix) The Tennessee Supreme Court in its opinion construed the franchise and excise tax statutes of Tennessee as not imposing a tax "on the privilege of doing an interstate business" as was the case with the Connecticut franchise tax law held unconstitutional by this Court in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S. Ct. 508 (1951); but did hold that the Tennessee taxes in question are "imposed upon the privilege of doing business in corporate form" in Tennessee and that they are additionally imposed "as a recompense for the protection" of the corporation's "local activities and as compensation for the benefits" the corporation "received from doing business in Tennessee."

(x) With respect to the aforesaid construction of the Tennessee franchise and excise tax statutes, appellant contends that all of its activities in Tennessee during the taxable years were inextricably bound up with interstate commerce, that the physical movement of crude oil by pipeline through Tennessee and the physical maintenance of such pipeline and related facilities were appellant's only activities in Tennessee. The movement of crude oil through Tennessee and the maintenance of interstate pipelines in fact constituted interstate operations and interstate commerce. Absent the pipeline and other facilities for the movement of crude oil or their maintenance, appellant

could not physically have moved crude oil through Tennessee at all. Appellant further contends that its existence in corporate form is not in itself sufficient under the Due Process Clause of the United States Constitution to sustain the imposition of taxes under either Chapter 29 or Chapter 27 of the Tennessee Code Annotated in the absence of local activities "separable" from its interstate operations.

QUESTIONS INVOLVED.

Given that appellant is an Ohio corporation, not domesticated or qualified in Tennessee, whose activities in that state are limited to physical operation and maintenance of a pipeline, pump stations and related facilities for the transportation of crude oil in a continuous movement in interstate commerce through the State of Tennessee, none of which activities cannot be realistically separated from the interstate transportation of crude oil:

A. Is the imposition by Tennessee of franchise and excise taxes upon appellant, under Chapters 29 and 27 of Title 67 of the Tennessee Code, constitutional insofar as applied to appellant under the Commerce Clause of the United States Constitution, Art. I, Sec. 8, I. 3?

B. Is the imposition of such franchise and excise taxes by Tennessee upon the Appellant constitutional insofar as applied to appellant under the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF CASE.

The facts in this case are not in dispute. The essential facts are set out sufficiently in the opinions of the Tennessee Supreme Court and the Chancery Court of Davidson County, Tennessee (Appendix A and Appendix C hereto). Appellant is an Ohio corporation with its only operating office at Longview, Texas. It owns and operates a pipeline system for the transportation of crude oil from origin points south of Tennessee through the State of Tennessee to destination points north of Tennessee under the tariffs filed with the Interstate Commerce Commission in compliance with the requirements of the Interstate Commerce Act. The crude oil so transported is owned by shippers and consignees. Appellant receives no crude oil in Tennessee and delivers none in Tennessee. It has no office in that state, employs no salesmen or solicitors anywhere, receives no revenues from residents of Tennessee and engages in no promotional activities in Tennessee. Its activities were and are limited to the physical maintenance and operation of a single pipeline (including pump stations, a microwave communications system and related facilities) for the transportation of crude oil in a continuous movement through Tennessee.

The issues of the constitutionality, under the Commerce and Due Process Clauses, of the imposition of the Tennessee franchise and excise taxes upon appellant were raised by appellant in communications to the Tennessee Commissioner of Revenue (Stipulation of Facts and exhibits thereto) prior to the filing by appellant of any franchise and excise returns. These questions were subsequently raised in protest letters accompanying each of the returns and the tax payments, and in each of the petitions or complaints filed in the Chancery Court of David-

son County, Tennessee for the recovery of the taxes so paid by appellant. The same questions were presented and preserved upon appeal to the Tennessee Supreme Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

The federal questions raised on this appeal involve the proper interpretation of the Commerce and Due Process Clause of the United States Constitution and the validity thereunder of state "privilege taxes" on purely interstate transportation operations of a common carrier pipeline.

The Tennessee Supreme Court upheld the imposition of taxes imposed under Chapters 29 and 27 of the Tennessee Code Annotated upon appellant on the following two grounds:

(a) That the taxes were imposed on the "doing of business" in corporate form in Tennessee and were not discriminatory since they applied to all corporations; and

(b) The taxes were imposed as compensation for the protection of appellant's "local activities" which were deemed sufficiently separable from interstate commerce to justify that imposition.

Does the State of Tennessee by Virtue of Chapters 29 and 27 of the Tennessee Code Annotated Have the Constitutional Authority to Tax the Appellant, an Interstate Pipeline Carrier, Upon the Privilege of "Doing of Business" in Corporate Form in Tennessee?

Appellant contends that the State of Tennessee does not have the constitutional authority to impose a privilege tax on the doing of business in corporate form in Tennessee upon appellant. Appellant contends that the Tennessee taxes in their incidence upon the appellant are imposed simply upon the privilege of doing business.

This Court may discern for itself the practical effect, the operating impact, of a state tax and on the basis of its own determination, this court may formulate its opinion of the constitutionality of the tax. *Lawrence v. State Tax Comm.*, 286 U.S. 276, 280 (1932); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 177 (1939); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 433 (1940); *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941); *Society for Savings v. Bowers*, 349 U.S. 143, 151 (1955); *Werner Machine Co. v. Director of Taxation*, 350 U.S. 492, 493 (1956); and *American Oil Co. v. Neill*, 380 U.S. 451, 455 (1965).

In *American Oil Company v. Neill, supra*, this Court, per Warren, C.J., stated at 380 U.S. 455:

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. Wisconsin v. J. C. Penney Co., 311 U.S. 435, 443-444; Lawrence v. State Tax Comm'n., 286 U.S. 276, 280 and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 80."

The appellant admits that its pipeline does pass through the State of Tennessee; appellant admits that by owning a right of way and certain parcels of property in Tennessee, it has subjected itself to substantial ad valorem real estate taxes. But appellant says that since it is a foreign corporation engaged solely in interstate commerce, i.e. in transportation of crude oil from points south of Tennessee to points north of Tennessee, and has no separable intrastate activities, the State of Tennessee cannot, consistently with the Commerce Clause, impose a franchise or

excise tax upon its privilege of conducting such interstate activities. *Murdock v. Pennsylvania,* 319 U.S. 105, 113 (1943); *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 463-464 (1959).

Appellant's real estate and pipeline easement in Tennessee are used *exclusively* in interstate transportation of crude oil. The activities of appellant in Tennessee are *inseparable* from interstate transportation of crude oil.

Appellant, a foreign corporation, engaged solely in interstate commerce in Tennessee, is exercising a privilege which Tennessee cannot tax since it is a federal privilege protected by the Commerce Clause. Owning property in Tennessee as part of the exercise of such federal privilege must be equally exempt from a state franchise or excise tax.

Does Appellant Conduct Within Tennessee "Local Activities" Sufficiently Separable from Interstate Commerce to Justify the Imposition of the Taxes Under Chapters 29 and 27?

Appellant contends that all its activities within the State of Tennessee are directly related to, and indeed an integral and inseparable part of its interstate commerce activities. The pipeline in question is automatic and is controlled by a microwave transmission from Longview, Texas. Obviously, any pipeline sometimes needs a physical repair and there are two foremen living in the jurisdiction of Tennessee and two electronic specialists who attend to the microwave facilities. But the personnel living within the State of Tennessee are directly concerned with the maintenance and operation of the pipeline—interstate commerce. This is not a case in which any local separable business is conducted, such as the solicitation of

orders, the picking up of commodities or the delivery of commodities within the State of Tennessee.

Admittedly this Court has sustained various state "privilege taxes" on corporations engaged in interstate commerce where it was found that there were local activities within the taxing state sufficiently separable and distinct from the interstate commerce operations. It is submitted that in each of such cases the corporation, apart from the purely interstate features of its operations, had local activities of one or more of the following kinds which were related to or designed to increase interstate business and were not themselves an essential part of the actual interstate operations—(i) regular solicitation of business through salesmen located in or traveling in each state—(ii) maintenance of offices for billing, collection of revenues, accounting, administration and/or promotional activities, including sales assistance to wholesalers or dealers handling the corporation's products—(iii) local newspaper advertisements, distribution locally of sales catalogues or brochures, continuous local contracts with customers and in some cases maintenance of local stocks of merchandise.

This court earlier held that a state privilege tax on a crude oil pipeline company not receiving or delivering crude oil within the taxing state is unconstitutional. *Ozark Pipeline Co. v. Monier,* 266 U.S. 555, 45 S. Ct. 184 (1925). Similarly, this court held unconstitutional a Texas privilege tax imposed on the privilege of "taking gas from a well" where the only activities of the pipeline company were the receiving of gas at the well and the immediate transportation of the same in interstate commerce. *Michigan-Wisconsin Pipeline v. Calvert,* 347 U.S. 157, 74 S. Ct. 396 (1954).

In the instant case in the Supreme Court of Tennessee the appellee relied heavily upon the case of *Memphis Nat-*

ural Gas Co. v. Stone, 335 U.S. 80, 68 S. Ct. 1475 (1948). There are several outstanding reasons why the decision in that case does not sustain the constitutionality of the Tennessee franchise and excise taxes levied under Chapters 29 and 27 of the Tennessee Code Annotated in the instant case. Several decisions of this court, more recent than that in *Memphis Natural Gas Co. v. Stone, supra*, including *Spector Motor Service, Inc. v. O'Connor, supra*, indicate that the decision in *Memphis Natural Gas, Inc. v. Stone, supra*, was not intended to invalidate the constitutional principles underlying the prior decisions of this court in *Ozark Pipeline Co. v. Monier, supra* and *Interstate Natural Gas Company v. Federal Power Commission*, 331 U.S. 682 (1947) in both of which cases franchise taxes on interstate pipelines had been held unconstitutional.

The more recent decisions of this Court severely limit the acceptability of *Memphis Natural Gas Co. v. Stone, supra*, and reassert the constitutional principle adhered to by the Supreme Court prior to that decision. These include, among others, the following—all of which were decided subsequent to *Memphis Natural Gas Co. v. Stone, supra*:

Spector Motor Service v. O'Connor, supra;
Michigan-Wisconsin Pipeline Co. v. Calvert, supra;
Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 72 S. Ct. 424 (1954);
Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 74 S. Ct. 558 (1954);
Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S. Ct. 357 (1959);
American Oil Co. v. Neill, 380 U.S. 451, 85 S. Ct. 1130 (1965).

Spector Motor Service v. O'Connor, supra, is a landmark in the field of state taxation of interstate commerce.

Spector Motor Service contested the right of the State of Connecticut to levy upon it an excise tax under the provisions of a taxing statute which provided that corporations carrying on business in that State "shall pay, annually, a tax or excise upon its franchise for the state." The case reached the United States Supreme Court after the Supreme Court of Connecticut had construed the tax as follows:

> "The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign * * *."

Spector Motor was engaged in the interstate transportation of freight by motor trucks, which went directly to the customers' places of business in the case of full truck loads, and which used pickup trucks to gather less than truck load lots of freight from customers for assembly into full truck loads at either of two terminals maintained in the state.

The Supreme Court in this decision ruled that Spector Motor's operations constituted interstate commerce exclusively, and that the attempted application of the Connecticut excise tax was invalid as an attempt to tax the Federal privilege of carrying on exclusively interstate commerce.

Justice Burton, speaking for the majority, stated in part:

> "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce when they gave Congress the power 'to regulate commerce with foreign nations, and among the several states * * *.' U. S. Const., Art. I,

Section 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress. Another example of this basic separation of powers is the inability of the states to tax the agencies through which the United States exercises its sovereign powers. See McCulloch v. Maryland, 4 Wheat. 136, 4250437, 4 L. Ed. 579; Brown v. Maryland, 12 Wheat. 419, 445-449, 6 L. Ed. 678; Mayo v. United States, 319 U.S. 441, 63 S. Ct. 1137, 87 L. Ed. 1504.

* * * * *

"This Court heretofore has struck down under the Commerce Clause state taxes upon the privilege of carrying on a business that was *exclusively* interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state. Alpha Portland Cement Co. v. Com. of Massachusetts, 268 U.S. 203, 45 S. Ct. 477, 69 L. Ed. 916 (measured by percentages of 'corporate excess' and net income); Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 45 S. Ct. 184, 69 L. Ed. 439 (Measured by percentage of capital stock and surplus). See Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662, 669, et seq., 69 S. Ct. 1264, 1267, 93 L. Ed. 1613 (dissenting opinion which discusses the issue on the assumption that the activities were in interstate commerce); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S. Ct. 815, 91 L. Ed. 993; Freeman v. Hewit, supra.

* * * * *

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law —McCulloch v. Maryland, supra."

Footnote 6 to the majority opinion is of particular interest in the present case because of its reference to an earlier case very similar in its principles instituted by Texas Gas' Predecessor, Memphis Natural Gas Company. This footnote being as follows:

> "6. The decision in Memphis Natural Gas Co. v. Beeler, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, upheld a Tennessee tax on earnings of the taxpayer within that State where the earnings were derived from the intrastate distribution of gas by the taxpayer in a joint enterprise with the Memphis Power & Light Company. Any suggestion in that opinion as to the possible validity of such a tax if applied to earnings derived wholly from interstate commerce is not essential to the decision in the case."

The *Spector* minority opinion by Justice Clark, joined by Justices Black and Douglas, emphasizes the effect of the majority opinion in restoring to interstate commerce the immunity which it had previously enjoyed in earlier cases but which had been whittled away to a large extent in cases such as *Memphis Natural Gas Company v. Beeler,* 315 U.S. 649, 62 S. Ct. 857 (1942). This minority opinion states in part:

> "Neither such a standard nor such a result persuades me. I agree with the well-reasoned opinions of the court below that the cases upholding fairly apportioned taxes on mixed intrastate and interstate business, and recognizing the rights of states to make interstate commerce pay its way have enfeebled—and justifiably so—*the precedents which today's decision restores to full vigor.* In the not too distant past, this seemed to be quite clear. In Memphis Natural Gas Co. v. Beeler, 1942, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090, a tax was upheld as being reasonably attributable to intrastate activities. But Chief Justice Stone, speaking for a unanimous Court, went further to state:

"'In any case, even if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there * * * or upon net income derived from within the state * * * is not prohibited by the commerce clause * * *.' 315 U.S. at page 656, 62 S. Ct. at page 862." (Emphasis added.)

As heretofore seen, it is undisputed that Mid-Valley is engaged in Tennessee solely and exclusively in interstate business. The *Spector Motor* case is supreme authority for the proposition that the State of Tennessee cannot exact from Mid-Valley a tax for the privilege of conducting such business under whatever guise said tax may be clothed.

The decision in *Michigan-Wisconsin Pipeline Co. v. Calvert, et al.*, 347 U.S. 157, 74 S. Ct. 396 (1954), resulted from separate suits to recover amounts paid under a Texas statute imposing a tax on the occupation of gathering gas. The Supreme Court refused to follow the State's argument that gathering of gas prior to its transportation across the state line into Oklahoma was a local event which was taxable and reversed the Supreme Court of Texas which had upheld the validity of the tax, stating:

"The appellees place much emphasis upon the fact that Texas through these conversation and proration measures has afforded great benefits and protection to pipeline companies. It is beyond question that the enforcement of these laws has been not only in the public interest but to the commercial advantage of the industry. But, though this be an appealing truth, these benefits are relevant here only to show that essential requirements of due process have been met sufficiently to justify the imposition of any tax on the interstate activity * * *."

* * * * *

"* * * The State Appellate Court realistically found 'the taxable event described by the statute' to be 'the taking or retaining of the gas at the gasoline plant outlet * * *.' It thought that since this local activity was not subject to repetition elsewhere, 'the sole question is whether such local activities are so closely related to and such an integral part of the interstate business of (appellants) who transport gas in interstate commerce as to be within the scope of the Commerce Clause of the Constitution * * *.'"

* * * * *

"* * * It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separate from it. Memphis Natural Gas Co. v. Stone, 1948, 335 U.S. 80, 87, 68 S. Ct. 1475, 1478, 92 L. Ed. 1832; Western Live Stock v. Bureau of Revenue, supra, 303 U.S. at page 258, 58 S. Ct. at page 550 * * *.

* * * * *

"* * * It is difficult to conceive of a factual situation where the incidence of taking or loading for transmission is more closely related to the transmission itself. This Court has held that much less integrated activity is 'so closely related to interstate transportation as to be practically a part of it!' We are therefore of the opinion that the taking of the gas here is essentially a part of interstate commerce itself."

The case of *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389, 72 S. Ct. 424 (1952), is particularly interesting inasmuch as it is a Mississippi case decided by the United States Supreme Court subsequent to the case of *Memphis Natural Gas Company v. Stone,* 335 U.S. 80, 68 S. Ct. 1475 (1948). It repudiated the theory of taxing

local incidents connected with interstate commerce upon which foundation the Stone case rested. In this case the Laundry Company contested the validity of a tax in the amount of $50.00 imposed "upon each person soliciting business for a laundry not licensed in this State as such." The Mississippi Supreme Court held that the tax was not a tax on interstate commerce but a tax on a person soliciting business for his laundry not licensed in the State, a local activity which applied to residents and non-residents alike. Chief Justice Vinson, delivering the majority opinion, stated:

> "It would appear from portions of the opinion of the court below that the tax is laid upon the privilege of soliciting interstate business on the theory that solicitation of customers for interstate commerce is a local activity subject to state taxation. However, the opinion below may also be read as construing the statutory term 'soliciting' more broadly, thereby resting the tax upon appellant's activities apart from soliciting new customers in Mississippi, namely the pick up and delivery of laundry and cleaning on regular routes within the State. Each construction of the statute raises different considerations. But clarification of the operating incidence of the tax is not required for disposition of this case since we find that the tax violates the Commerce Clause under either reading of the statute.
>
> I.
>
> "In the long line of 'drummer' cases, beginning with Robbins v. Shelby County Taxing District, 1887, 120 U.S. 489, 7 S. Ct. 592, 30 L. Ed. 694, this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted

state taxation to carve out this incident from the integral economic process of interstate commerce. As the Court noted last term in a case involving door-to-door solicitation of interstate business, 'Interstate commerce itself knocks on the local door.'

"If the Mississippi tax is imposed upon the privilege of soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business. A tax so imposed cannot stand under the Commerce Clause. Spector Motor Service, Inc. v. O'Connor, 1951, 340 U.S. 602, 608-609, 71 S. Ct. 508, 511-512, 95 L. Ed. 573, and cases cited therein."

The Court then refused to allow the tax to stand under the theory of the "peddler cases" as a tax upon itinerant hawkers and peddlers, the theory there being that the local sale and delivery of goods is essentially an intrastate process. It ruled that even under this approach there was discrimination inasmuch as the tax applied only to persons soliciting business for a laundry not licensed in the State and did not apply in the case where a laundry was located in the State. In conclusion the Court stated:

"To sum up, we hold that the tax before us infringes the Commerce Clause under either interpretation of the operating incidence of the tax. The Commerce Clause created the nationwide area of free trade essential to this country's economic welfare by removing state lines as impediments to intercourse between the states. The tax imposed in this case made the Mississippi state line into a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause.

'Reversed.' "

Only Justice Black dissented from the opinion. The Court made no mention of *Memphis Natural Gas Com-*

pany v. Stone, supra, but specifically rejected the doctrine that local activities may be separated from interstate commerce and become the foundation of a privilege tax.

In the case of *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954), a Virginia statute levied taxes on properties of express companies but additionally provided that "for the privilege of doing business in this state" express companies shall pay an "annual license tax" upon gross receipts earned in the state "on business passing through, into or out of this state." The plaintiff engaged exclusively in interstate transportation of freight. It picked up shipments in the state. It did not engage in the transportation of commodities from one point to another within the state.

The Supreme Court held that the additional so-called "license tax" was not, in fact, a property tax but a privilege tax sought to be imposed in respect of local activities inseparable from interstate commerce and consequently was unconstitutional as a tax on interstate commerce.

Mr. Justice Jackson, in his opinion (page 367) uses the following language which in all respect supports the position of the appellant herein:

> "Here the State exercises every receipt from movement of express interstate commerce. It takes a portion of gross revenue from 'all receipts earned in this State on business passing through, into or out of this State.' It contends that this obvious burden on interstate commerce is validated by state protection of a localized incident in the course of the business. The three incidents are originating the interstate movement, which requires local pickup of the parcels; terminating the movement, which requires delivery, and movement through the State. If each of these incidents is sufficient warrant for taxing gross revenues from wholly interstate commerce, a concern

> doing a nationwide business is vulnerable to a gross-revenue tax in every one of the forty-eight states. But it is argued that this is permissible, provided the states formulate their burden so as each to burden it proportionately, not encroaching on the other's right to burden. It is enough to say that we recently have ruled that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602; Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157; New Jersey Bell Telephone Co. v. State Board, 280 U.S. 338."

Appellant submits that in the light of recent decisions of this Court, the Supreme Court of Tennessee was clearly wrong in sustaining the validity of the taxes imposed by Chapters 29 and 27 of the Tennessee Code Annotated. The taxes as imposed upon appellant severely burdened interstate commerce. The activities of appellant, in turn, are solely and exclusively related to interstate commerce and are not local in character. All of appellant's activities are inseparable from and an integral parts of its interstate pipeline activity.

CONCLUSION.

In recent years a number of state supreme courts have had occasion to pass on the constitutionality, under the Commerce Clause, of privilege taxes imposed by their own states. In many such decisions the state supreme courts either by direct decision or by way of dicta have held or observed that the imposition of any such privilege taxes on an interstate pipeline company if construed to apply to the complaining corporation would violate the

Commerce Clause of the United States Constitution. Such decisions, or at least dicta contained therein, exemplified by the following cases, are clearly contrary to the determination of the Tennessee Supreme Court in this case. *State v. Plantation Pipeline Company,* 265 Ala. 69 (1956), 89 So. (2nd) 549 (1956), cert. den. 352 U.S. 943, 77 S. Ct. 265 (1956); *Sinclair Pipeline Company v. Carpentier,* 10 Ill. (2nd) 300, 140 N.E. (2nd) 115 (1957); *American Telephone and Telegraph Company v. Everett,* 152 A. (2nd) 295 (Del. Ch. 1959).

The Tennessee Supreme Court's decision in the instant case is clearly in conflict with the decisions of other state supreme courts cited immediately above. There appears, therefore, to be confusion as to the type of state "privilege taxes" which might be held to be constitutional under the Commerce Clause when applied to pipeline companies engaged exclusively in interstate transportation.

It is therefore submitted that this Court should exercise its jurisdiction to review the decision of the Tennessee Supreme Court herein to the end that such confusion be dispelled.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE TENNESSEE SUPREME COURT.

Three cases filed by Mid-Valley Pipeline Company against the Commissioner of Revenue were consolidated for trial. The suits sought recovery of franchise and excise taxes paid under protest for the years 1963, 1964, 1965 and 1966. By a supplemental bill to the original bill filed to recover the taxes for the years 1963 and 1964, Mid-Valley sought recovery of penalties paid subsequent to payment of the taxes for those years.

Complainant, Mid-Valley, alleged it was a common carrier engaged in the transportation of crude oil in continuous flow by means of a single pipeline extending from points south of the southern border to receiving points beyond the northern border of Tennessee.

It was further alleged complainant was engaged solely in interstate commerce in this State; and that it was not engaged in any local activities within the State which were sufficiently separate from its interstate operations to be made the subject of franchise or excise taxes.

It was then alleged the imposition of franchise and excise taxes upon complainant pursuant to Chapters 27 and 29 of Title 67, T. C. A., would constitute a violation of the due process and commerce clauses of the Constitution of the United States.

In the supplemental bill, complainant alleged the penalties were illegally exacted because the taxes and interest thereon, upon which the penalties were assessed, were paid prior to expiration of a lawfully granted extension of time.

The Chancellor heard the matters upon the bills, answers of defendants, the deposition of John E. Triece, Assistant Secretary and Manager, Tax and Insurance De-

partment of Mid-Valley, and certain exhibits to his testimony.

The Chancellor held the suit seeking a recovery of franchise and excise taxes should be dismissed upon authority of *Texas Gas Transmission Corporation vs. Atkins,* 205 Tenn., 495, 327 S. W. (2d) 305 (1959) and *Memphis Natural Gas Company v. Stone,* 335 U.S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948). He found, however, complainant was entitled to recover the penalties paid on the 1963 and 1964 taxes. We affirm the decree of the Chancellor.

Both parties prayed and were granted an appeal to this Court. However, defendants have not filed an assignment of error and brief in support thereof. Consequently, we must treat defendants' appeal as having been abandoned. Rule 15 (2), Rules of the Supreme Court.

Complainant has assigned four assignments of error which present the question of whether Tennessee may constitutionally exact franchise and excise taxes from complainant under Chapters 27 and 29 of Title 67, T. C. A., for the years involved during which complainant was engaged solely in the business of transporting through Tennessee crude oil from and to points outside of the State.

The facts, as found by the Chancellor, are undisputed. Complainant is an Ohio corporation with its principal office in Longview, Texas, and is engaged in the business of transporting crude oil through a pipeline from points in Texas, Louisiana and Arkansas to points in Kentucky and Ohio.

The total length of the pipeline is 1,007.6 miles of which 153.7 miles is in Tennessee. The pipeline enters Tennessee near the midpoint of the Mississippi-Tennessee boundary line and exits on the Kentucky-Tennessee boundary at a point north of Clarksville. Its operations are

under the jurisdiction of the interstate commerce commission.

Complainant owns properties in Tennessee consisting of a right-of-way across the State, fifty feet in width; several parcels of land upon which two pumping stations and seven microwave towers are located; two station wagon automobiles and miscellaneous equipment for right-of-way maintenance and fire fighting. It has contracts with two Tennessee Electric Membership Cooperatives for furnishing power to operate complainant's pumping stations.

Complainant has four employees who reside in this State. Two of the employees are pumping station foremen and two are communication technicians. One pumping station foreman lives in Hornsby and the other in Denver with their respective families. Each is furnished a Company owned house in which to live situated on Company owned property upon which the pumping stations stand.

One of the communication technicians resides in Jackson and the other in Clarksville. Each is furnished a station wagon. The technician living at Jackson maintains four microwave towers and the one residing in Clarksville maintains three towers.

The pumping stations are controlled from a central control room in Longview, Texas. This control room monitors the entire pipeline system electronically by receiving signals from the microwave towers along the pipeline. Incidental maintenance work for the pumping stations and right-of-way in Tennessee is provided by Company employees who reside in Oxford, Mississippi, and brought into the State when their services are needed. Incidental technicians are also brought into this State when needed.

Complainant, a foreign corporation, has not qualified to do business in this State. However, it has carried on its

business activities within the State in corporate form, suing and being sued in its corporate name, contracting for services and acquiring title to property in its corporate capacity.

Complainant neither accepts, stores, delivers, nor sells oil in Tennessee.

The Tax Commissioner assessed the excise and franchise taxes under T. C. A. Sections 67-2701, et seq., and T. C. A. Sections 67-2901, et seq., respectively. Section 27-2701 authorizes the levy of an excise tax on corporate earnings, equal to five per cent of the net earnings from business done within the State. Section 67-2904 authorizes a corporate franchise tax, "of fifteen (15¢) cents on the One Hundred Dollars ($100.00), or major fraction thereof, of the issued and outstanding stock, surplus and undivided profits," of each taxable corporation during each taxable year.

By Chapters 185 and 183, Public Acts of 1955, the Legislature amended respectively the excise and franchise tax statutes by adding to each the following:

> "Every such taxable entity organized and existing under and by virtue of the laws of this or any other State, Territory, or Country, or organized and existing without any specific statutory authority, now or hereafter doing business within this State, without domesticating or qualifying to do business in this State, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefit it receives from doing business in Tennessee, pay the tax imposed by this Chapter."

Complainant is subject to excise and franchise taxation, if at all, under the provisions of this paragraph.

Complainant, by its first assignment of error, insists the Chancellor erred in holding the taxes were validly

imposed on the theory they were imposed upon complainant's local activities. Complainant argues this was prejudicial because complainant conducted no local, or intrastate activities which could form the basis for exaction of the taxes.

The franchise and excise taxes are upon the privilege of engaging in business in corporate form in Tennessee, and not merely on the doing of business. *Texas Gas Transmission Corporation vs. Atkins,* 197 Tenn., 123, 270 S. W. (2d) 384 (1943), certiorari denied 75 S. Ct. 125, 348 U.S. 883, 99 L. Ed. 694; *Texas Gas Transmission Corporation vs. Atkins,* 205 Tenn., 495, 327 S. W. (2d) 305 (1959).

Foreign corporations, doing business in this State without domesticating or qualifying to do business in Tennessee, shall, as a recompense for the protection of their local activities and as compensation for the benefits they receive from doing business in Tennessee, pay franchise and excise taxes. T. C. A. Sections 67-2701 and 67-2902; *Texas Gas Transmission Corporation vs. Atkins,* 205 Tenn., 495, *supra.*

The fact complainant is and has been solely engaged in interstate commerce within this State is not determinative. *Texas Gas Transmission Corporation vs. Atkins,* 205 Tenn., 495, *supra.*

Local incidents or activities may be a basis for a franchise or excise tax, measured by a properly apportioned net income of a foreign corporation engaged solely in interstate commerce, provided the local activities can be separated from interstate commerce. *Texas Gas Transmission Corporation vs. Atkins,* 205 Tenn., 495, *supra; Memphis Natural Gas Company vs. Stone,* 335 U.S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948); *Northwestern State Portland Cement Company vs. Minnesota,* 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. (2d) 421 (1959).

In the recent case of *Roadway Express, Inc. vs. Director, Division of Tax*, 50 New Jersey 471, 236 A. (2d) 577 (1967), certiorari denied by U.S. Supreme Court April 29, 1968, the Court upheld a state franchise tax, although Roadway was doing exclusively interstate business in New Jersey. The provision of the New Jersey tax is as follows:

> "Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for the year One Thousand Nine Hundred and Forty-Six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu of all other state, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this Act."

In Upholding the tax, The Supreme Court of New Jersey analyzed the decision in the case of *Spector Motor Service, Inc. vs. O'Connor*, 340 U.S. 602, 7 S. Ct. 508, 95 L. Ed. 573 (1951), in the light of the later decisions of the United States Supreme Court in *Railway Express Agency vs. Virginia*, 358 U.S. 434, 79 S. Ct. 411, 3 L. Ed. 450 (1959); *Northwestern State Portland Cement Company vs. Minnesota, supra;* and *General Motors Corporation vs. Washington*, 377 U.S. 436, 84 S. Ct. 1564, 12 L. Ed. 430 (1964), and then said:

> "On the thesis of the progression of rationale shown by these decisions, viewed in the light of our statutory provisions, we conclude that it is correct to say that the New Jersey corporate business tax, by reason of the alternative basis set forth in the Act, is not imposed upon foreign corporations merely or solely for the privilege of doing interstate busi-

ness in New Jersey. We think also there is no longer necessarily any conclusive magic in the denomination of a tax as 'franchise' tax or by another label. We believe validity will now be judged, broadly speaking and in the absence of congressional action, on whether it is a fairly apportioned, nondiscriminatory means of requiring such a corporation to pay its just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit. We are of the opinion that the New Jersey tax meets that test as applied to the taxpayers here involved.

"It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the State is constitutionally forbidden. We therefore construe that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here. Since a tax may not exclude such corporation from doing such business within it, it may not exact an impost on the thesis of a condition of entry therein. More technically speaking, it is our view that the New Jersey tax is validly applicable to these taxpayers on the foundation of other basis expressed in the statute. The first is that the tax is expressly in lieu of 'all other state, county or local taxation upon or measured by intangible personal property' of a foreign corporation, which kind of a tax we conceive could be validly imposed on a corporate entity of another state conducting an exclusively interstate business here. We believe the tax is additionally sustainable as a levy 'for the privilege of * * * employing or owning capital or property or maintaining an office, in this State, if not also 'for the privilege of * * * exercising its corporate franchise' here. We think such privileges are sufficiently different from that of 'doing' interstate business so that they are, in the sense stated in Spector, aspects of such business subject to the sovereign power of the state."

In the case of *Memphis Natural Gas Company vs. Stone, supra*, the Gas Company piped gas across the State of Mississippi. It did no intrastate business in that State. It was not qualified to do business in Mississippi, had no office in the State and no employees other than those necessary to maintain the pipeline. It did deliver gas to one customer in the State at wholesale, an activity which has, without exception, been held to constitute interstate commerce.

Mississippi imposed a franchise or excise tax of $1.50 per $1,000.00 of the capital used, invested or employed in Mississippi, upon domestic corporations; and, "* * * upon every corporation * * * organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any statutory authority now, or hereafter, doing business within this State * * *."

The Supreme Court of Mississippi concluded the statute did not attempt to tax interstate commerce. The Court said: "* * * The levy is an exaction which the state requires as a recompense for the protection of lawful activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it by the nature of its organization * * * here the local activities in maintaining, keeping in repair and otherwise in manning the facilities of the system throughout the one hundred-thirty-five miles of its line in this State."

In affirming the Supreme Court of Mississippi, the Supreme Court of the United States said:

> "We think that the State is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its border. Of course, the interstate commerce cannot

> be conducted without these local activities. But that fact is not conclusive. There are events apart from the flow of commerce. This is a tax on activities from which the State, not the United States, gives protection and the State is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business."

The record in the instant case clearly shows complainant has and is employing or owning capital or property in this State and exercising its corporate franchise within the State. It maintains its right-of-way and other valuable properties located in this State in its corporate capacity. It has and is using our courts to vindicate its rights.

Such local activities, although incidental to the conduct of interstate commerce, are taxable under the foregoing authorities.

It is next insisted by complainant the taxes cannot be levied validly because it is an undomestic foreign corporation, doing an exclusive interstate business in Tennessee, and constitutes an exaction for the privilege of engaging solely in interstate commerce which violates the commerce clause of the United States Constitution.

Complainant cites a number of decisions by the Supreme Court of the United States which it insists supports this argument. The leading case is that of *Spector Motor Service, Inc. v. O'Connor, supra,* upon which complainant primarily relies.

The Court in the case of *Texas Gas Transmission Corporation vs. Atkins,* 205 Tenn., 495, *supra,* held.

> "We are of the opinion the 1955 amendment does not attempt to tax interstate commerce; the language is reasonably clear to the effect that it describes a taxable entity as being one not organized or doing business under the authority of the State of Tennessee, but the tax is levied as a recompense for the

protection of the local activities, which are substantial, of that entity as compensation for the protection it receives for its local activities which are the benefits it receives from doing business in Tennessee."

In the case of *Texas Gas Transmission Corporation vs. Atkins,* 197 Tenn., 123, *supra,* the Court said:

"It is our conclusion that the crux of the Spector case is that the Supreme Court accepted as its basic predicate the construction placed upon the statute involved by the highest court of Connecticut, which held that the tax was levied upon the right to do interstate business. The right to do business in corporate form was not involved in the case.

"The Tennessee franchise tax, however, is imposed upon 'the privilege of engaging in business in corporate form in this State.'

"The excise tax, although not expressly so providing, has likewise been construed."

Nevertheless, complainant insists these two cases are not controlling because the taxpayer in both cases conducted numerous activities in this State capable of being adjudged "local activities" which are not conducted by complainant.

While this is true, we have hereinabove pointed out the local activities which complainant has and is conducting in Tennessee, which we think are substantial and taxable under the 1955 amendments.

Finally, it is argued the Chancellor was in error in upholding the validity of the taxes on authority of *Memphis Natural Gas Company vs. Stone, supra.* It is insisted later decisions of the Supreme Court of the United States have limited the decision in that case strictly to its peculiar facts, not present in the case at bar. Complainant engaged in the same local activities as set out in the *Stone* case, except in one instance. It does not sell or deliver oil in

Tennessee; whereas, Memphis Natural Gas Company did deliver gas to one customer at wholesale in Mississippi.

In the very recent case of *Roadway Express, Inc. vs. Director, supra,* the same principle as announced in the *Stone* case was reaffirmed.

The privileges taxed in *Spector* under the Connecticut statute were confined to those "of carrying on or doing business within the state." Mr. Justice Burton, speaking for the majority, held since the Supreme Court of Connecticut had construed the statute as a tax solely on Spector's franchise to do interstate business, this "channel" through which the State sought to make interstate commerce pay its way was unconstitutional.

However, the opinion specifically pointed out, "the State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory."

The taxes are imposed upon the privilege of doing business in corporate form and are nondiscriminatory as they apply to all foreign corporations doing business in this State in corporate form.

All assignments of error are overruled and the decree of the Chancellor is affirmed. Complainant will pay the costs.

CHESTER C. CHATTIN,
Justice.

Burnett, C.J., Dyer, J., Concur. Creson and Humphreys, JJ., not participating.

APPENDIX B.

JUDGMENT OF THE SUPREME COURT OF TENNESSEE.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is no error.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be in all things affirmed and that complainant's bills for recovery of franchise and excise taxes and statutory interest hereon for the years 1963, 1964, 1965 and 1966 be dismissed.

It is further ordered, and decreed by the Court that as to the penalties exacted of complainant and sought to be recovered in the supplemental bill, complainant is entitled to recover same with interest at the rate of six per cent per annum from March 2, 1966. The costs of the Court below incident to the supplemental bill will be paid by the appellee.

All other costs of the Court below and the cost of the appeal will be paid by Mid-Valley Pipeline Company, Principal, and Aetna Casualty & Surety Company, Surety, for which let execution issue. 8/23/68.

(Creson and Humphreys, JJ., not participating.)

APPENDIX C.

OPINION OF CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE.

(Entered February 1, 1968.)

These are suits brought by the complainant to recover of the defendants franchise and excise taxes paid by it under protest, and, in addition, by a supplemental bill complainant seeks to recover a penalty assessed against it and paid under protest.

Complainant is an Ohio corporation with its principal office and place of business in Longview, Texas, and is engaged in the business of transporting crude oil by pipe line from points in Texas, Louisiana and Arkansas, which it delivers to points in Kentucky and Ohio. The pipe line enters the State of Tennessee near the mid-point of the Mississippi-Tennessee line and exits on the Kentucky-Tennessee line at a point northerly of Clarksville. The pipe is 1,007.6 miles in length of which 153.7 is located in Tennessee. The complainant neither accepts nor delivers crude oil in Tennessee. It owns properties in Tennessee consisting of its rights-of-way, two pumping stations, seven microwave towers, two vehicles and miscellaneous equipment for right-of-way maintenance. It has two contracts with Tennessee Electric Membership Cooperatives for furnishing power to operate complainant's pumping stations. It has four employees who reside in Tennessee, two of these are pumping station foremen who reside in company provided cottages with their families at complainant's pumping stations at Hornsby and Denver, Tennessee. In addition it employs communications technicians who reside, one in Jackson and the other in Clarksville, Tennessee. When necessary complainant brings in other workmen from out of State bases.

Complaint is an undomesticated foreign corporation although it is qualified to do business in the other States through which its pipe line passes. It carries on its business activities in Tennessee in corporate form, suing and being sued as a corporation, and contracting and taking title to property in its corporate name.

The foregoing facts are undisputed. It is the insistence of the complainant, however, that it is engaged only in interstate commerce in the State of Tennessee and that its local activities cannot be separated from those of its interstate business.

This Court is of the opinion that this case cannot be distinguished from and is controlled by *Texas Gas Transmission Corporation vs. Atkins*, 205 Tenn. p. 495, and *Memphis Natural Gas vs. Stone* 335 U.S. 80, 92 L. Ed. 832.

In those cases, the complainants were engaged only in interstate commerce as corporations as is the complainant in this case, and this Court is of the opinion that the slight difference in the activities of the three complainants is immaterial.

The Supreme Court of Tennessee in the Texas Gas Transmission Corporation case had before it the same statute that is before the Court in this case, and among other things, is held:

> "We are of opinion that the 1955 amendment does not attempt to tax interstate commerce; the language is reasonably clear to the effect that it describes the taxable entity as being one not organized or doing business under the tax is levied as a recompense for the protection of the local activities, which are substantial, of that entity as compensation for the protection it receives for its local activities which are the benefits it receives from doing business in Tennessee." (205 Tenn., at page 500.)

The holding in the *Memphis Natural Gas Company vs. Stone* case is to the same effect.

The Court is, therefore, of the opinion that the suits brought to recover the franchise and excise taxes paid by the complainant should be dismissed at complainant's costs.

On or about March 10, 1966, complainant filed its supplemental bill for the recovery of penalties which were demanded by the defendant and paid by the complainant under protest on March 2, 1966, on excise and franchise taxes previously assessed and paid under protest for the years 1963 and 1964.

The undisputed facts are that, by letter dated May 16, 1965, demand was made by the defendant upon the complainant for the filing of returns and payment of franchise and excise taxes for the years 1963 and 1964. The due dates for the filing of such returns for said years, respectively, were April 1, 1964, and April 1, 1965. Complainant protested the defendant's demand for taxes and through its attorney by letter dated August 18, 1965, requested the defendant to extend the time for the filing of the demanded reports and the payment of taxes until September 15, 1965. The defendant by letter dated September 1, 1965, granted the extension of time requested. However, said letter among other matters, stated:

> "When payment of tax is received, the file of the company will be held for thirty days in order that the corporation might avail itself to the right of litigation of this matter. If suit is not filed within thirty days, then the returns will be accepted without penalty or interest. Should it be that the corporation would pay the tax under protest and bring suit within thirty days, then we can see no other recourse than to assess the corporation for penalty and interest accrued on the 1963 and 1964 tax returns."

The returns for the years 1963 and 1964 and the amount of taxes shown thereby, together with interest, were filed and paid under protest by the complainant on September 10, 1965, before the expiration of the extension period.

Thereafter, on November 16, 1965, the defendant made demand for payment of the penalties on the aforesaid taxes and after further correspondence complainant paid the penalties under protest and in due time filled its supplemental bill for their recovery.

The Court is of the opinion that an extension of time having been granted the complainant within which to pay the taxes and same with interest having been paid under protest within the extended time, it had a right to sue for the recovery of the payments made and the defendant should not have assessed complainant with penalties.

The complainant will be given a decree for the penalties paid with interest from the date of payment and will also recover of the defendant the costs incident to the supplemental bill.

Decree accordingly.

APPENDIX D.

FINAL DECREE OF THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE.

These causes came to be heard upon this 29th day of February, 1968, and prior days of the term, upon the original bills in nos. 88260, 88874 and 89847 and a supplemental bill to no. 88260, defendant's answers thereto, depositions of witnesses, a stipulation making certain documents a part of the record in the cause for all purposes, a stipulation that all three causes should be tried, considered and decided together by the Honorable Alfred T. Adams, and that the proof and the aforesaid stipulation should be considered as a part of the record in all three causes insofar as applicable, oral arguments and briefs of counsel, and the entire record. From all of these the Court is of the opinion that complainant is liable for the franchise and excise taxes asserted against it by defendant for the tax years in question, hence not entitled to recover the amounts of such taxes paid to defendant under protest by complainant and sought in these actions to be recovered. The Court is of the opinion, however, that complainant was not liable for the penalties exacted of it by defendant and paid under protest by complainant on March 2, 1966, and sought to be recovered in the supplemental bill filed by complainant to No. 88260. The foregoing conclusions are reached for reasons more fully set forth in a memorandum opinion of the Court dated February 1, 1968, which memorandum opinion is incorporated herein by reference and made a part of the record in this cause.

It is accordingly ORDERED, ADJUDGED and DECREED that as to the franchise and excise taxes, and the statutory interest thereon exacted of complainant for the years 1963, 1964, 1965 and 1966, complainant is not entitled to

recover the amounts thereof, and its bills for such purpose be and the same are hereby dismissed with costs, for which execution may issue if necessary.

It is further ORDERED, ADJUDGED and DECREED, however, that as to the penalties exacted of complainant and sought to be recovered in the supplemental bill hereinbefore referred to, complainant is entitled to recover same, with interest at the rate of 6% per annum from March 2, 1966, and defendant will make refund thereof to complainant. The costs incident to said supplemental bill are adjudged against defendant, but will not include any state and county litigation taxes, from which defendant is by law exempt.

From so much of the foregoing as holds complainant liable for the franchise and excise taxes for the calendar years 1963, 1964, 1965 and 1966, and dismisses its bills to recover said taxes, complainant excepts, and prays an appeal to the next term of the Supreme Court of Tennessee sitting at Nashville, which appeal is by the Court granted. Complainant having submitted herewith an appeal bond in due form as required by law, the said bond is by the Court approved and ordered filed, thus perfecting the appeal on the part of complainant.

From so much of the foregoing as holds that complainant was not liable for the penalties exacted of it by the defendant and paid under protest by complainant on March 2, 1966, and sought to be recovered in the supplemental bill filed by complainant to No. 88260, and adjudges certain limited costs against defendant, the defendant excepts and prays an appeal to the next term of the Supreme Court of Tennessee sitting at Nashville, which appeal is by the Court granted. Defendant being excused from filing an appeal bond, the appeal on the part of the defendant is, therefore, perfected.

APPENDIX E.

TENNESSEE CODE ANNOTATED.

Chapter 27—Excise Tax on Corporate Earnings.

67-2701. Corporations subject to tax—Rate.—All corporations, cooperatives conducted for profit, joint-stock associations and business trusts, organized under the laws of this state, other than those organized for general welfare and not for profit, and all such entities organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception, pay to the commissioner of revenue annually an excise tax, in addition to all other taxes, equal to five per cent (5%) of the net earnings for their next preceding fiscal year, from business done within the state; provided, however, net earnings shall not include dividends received from any other corporation paying excise tax under the provisions of this chapter, where such other corporation is a wholly owned subsidiary of the taxpayer; provided further, that all entities enumerated hereinabove and taxable under this section may carry their current year's losses forward two (2) years in computing net income subject to said tax.

Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing business within this state, without domesticating or qualifying to do business in this state; or while its charter is forfeited, revoked or suspended shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter.

Any corporation organized under the laws of the state of Tennessee whose sole expressed corporate purpose is for

the furthering of industrial development in communities throughout the state, and doing related matters thereto, and whose stockholders receive no income other than interest or dividends on money invested in said corporation for constructing industrial buildings and whose officers receive no compensation shall be exempt from the payment of franchise and excise taxes.

Chapter 29—Corporate Franchise Tax.

67-2902. Corporation subject to tax.—All corporations organized under the laws of this state, other than those organized for general welfare and not for profit, and all corporations organized under the laws of any other state or country for profit and doing business, in Tennessee, shall, without exception other than as provided in § 67-2911, pay to the commissioner of revenue annually a privilege tax in addition to all other taxes, the rate and measure of which are hereinafter set forth. The tax hereby imposed shall be paid for the privilege of engaging in business in corporate form in this state and shall be in addition to all other taxes levied by any other statute.

Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing business within this state, without domesticating or qualifying to do business in this state, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter.

Any corporation organized under the laws of the state of Tennessee whose sole expressed corporate purpose is for the furthering of industrial development in communi-

ties throughout the state, and doing related matters thereto, and whose stockholders receive no income other than interest or dividends on money invested in said corporation for constructing industrial buildings and whose officers receive no compensation shall be exempt from the payment of franchise and excise taxes.

The tax hereinbefore levied shall also be paid by all business trusts, commonly known as Massachusetts Trusts, for the privilege of doing business in Tennessee and the word "corporation" when used herein shall be deemed to include a business trust unless the particular context requires a different meaning.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

MID-VALLEY PIPELINE COMPANY, Appellant,

vs.

DONALD R. KING, Commissioner of Revenue, Appellee.

MID-VALLEY PIPELINE COMPANY, Appellant,

vs.

THOMAS D. BENSON, Commissioner of Revenue, Appellee.

Three Cases.

MOTION TO DISMISS APPEAL.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968.

No. .....

MID-VALLEY PIPELINE COMPANY, Appellant, vs. DONALD R. KING, Commissioner of Revenue, Appellee. MID-VALLEY PIPELINE COMPANY, Appellant, vs. THOMAS D. BENSON, Commissioner of Revenue, Appellee.	Three Cases.

MOTION TO DISMISS APPEAL.

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves to dismiss the appeal from the final judgment and decree of the Supreme Court of Tennessee upon the ground that it does not present a substantial federal question.

MAY IT PLEASE THE COURT:

OPINIONS BELOW.

The opinion of the Supreme Court of Tennessee in these cases is not as yet officially reported but is unofficially reported at 431 S. W. 2d 277. The opinion of the trial court, the Chancery Court of Davidson County, is not reported officially or otherwise. Both opinions are correctly reproduced in Appendices A and C, respectively, of Appellant's Jurisdictional Statement.

JURISDICTION.

The procedural jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED.

Whether a foreign corporation engaged exclusively in interstate commerce in Tennessee is liable for the Tennessee corporation franchise and excise taxes, which are imposed upon the doing of business in corporate form in Tennessee or as a recompense for the protection of its local activities and the benefit received from the doing of business in Tennessee.

STATUTES INVOLVED.

The pertinent provisions of the Tennessee taxing statutes involved are as follows:

Excise Tax

"67-2701. Corporations subject to tax—Rate.—All corporations, cooperatives conducted for profit, joint-stock associations and business trusts, organized under the laws of this state, other than those organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception, pay to the commissioner of revenue annually an excise tax, in addition to all other taxes, equal to five per cent (5%) of the net earnings for their next preceding fiscal year, from business done within the state; provided, however, net earnings shall not include dividends received from any other corporation paying excise tax under the provisions of this chapter, where such other corporation is a wholly owned subsidiary of the taxpayer; provided further, that all entities enumerated hereinabove and

taxable under this section may carry their current year's losses forward two (2) years in computing net income subject to said tax.

"Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing business within this state, without domesticating or qualifying to do business in this state, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter."

Franchise Tax

"67-2902. Corporation subject to tax.—All corporations organized under the laws of this state, other than those organized for general welfare and not for profit, and all corporations organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception other than as provided in § 67-2911, pay to the commissioner of finance and taxation annually a privilege tax in addition to all other taxes, the rate and measure of which are hereinafter set forth. The tax hereby imposed shall be paid for the **privilege** of engaging in business **in corporate form** in this state and shall be in addition to all other taxes levied by any other statute.

"The tax hereinbefore levied shall also be paid by all business trusts, commonly known as Massachusetts Trusts, for the privilege of doing business in Tennessee and the word 'corporation' when used herein shall be deemed to include a business trust unless the particular context requires a different meaning" (Emphasis supplied).

STATEMENT.

The facts as set forth in Appellant's Statement of the Case (pp. 7-8 of Jurisdictional Statement) are accurately stated. The record further shows, however, substantial local activities carried on by Appellant in Tennessee in the exercise of its corporate franchise.

Appellant owns properties in Tennessee consisting of a right of way traversing the State fifty feet in width, parcels of land upon which are situated two pumping stations and seven microwave towers; and two station wagon vehicles and miscellaneous equipment for right-of-way maintenance and fire-fighting. It has four resident employees engaged in the operation and maintenance of its line and appurtenances. Two of these reside in company-owned houses at Appellant's pumping stations.

Appellant contracts with two local suppliers of electric power to obtain the electricity necessary to operate its pumping stations. This is done by Appellant in its capacity as a corporation. Appellant likewise takes title to property in Tennessee in its corporate capacity, and sues and is sued in the courts of Tennessee as a corporation.

ARGUMENT.

The question presented by this appeal is in no sense a new one. It has been resolved by this Court adversely to Appellant's position in several cases over the past thirty-odd years. Though Appellant has persistently and vigorously emphasized the interstate character of its business activities and their commerce clause immunity to Tennessee taxation, the record shows that the predicate for the questioned taxes is not the character of Appellant's business, but the manner and form in which that business is conducted.

The Supreme Court of Tennessee has consistently held the excise and franchise taxes to be upon "the privilege of doing business **in corporate form,**" **Texas Gas Transmission Corp. v. Atkins**, 197 Tenn. 123, 131, 270 S. W. 2d 384, cert. den. 348 U. S. 883, 99 L. Ed. 694; "upon the particular privilege of doing business in the corporate capacity; i. e., with the advantages that arise from the corporate or quasi corporate organization," **Bank of Commerce & Trust Co. v. Senter**, 149 Tenn. 569, 583, 260 S. W. 144; "upon the privilege of doing business as a corporation and exercising the corporate powers for the purpose of producing a profit," **Memphis Dock & Forwarding Co. v. Fort**, 170 Tenn. 109, 110, 92 S. W. 2d 408; "upon the privilege of exercising the corporate privilege in this state," **Jorgensen-Bennett Mfg. Co. v. Knight**, 156 Tenn. 579, 583, 3 S. W. 2d 668; and upon "the right to do business in corporate form," **Corn v. Fort**, 170 Tenn. 377, 95 S. W. 2d 620.

Since the decision in **Texas Gas Transmission Corp. v. Atkins**, supra, the most recent of these decisions, the General Assembly has further defined the basis of the taxes. In 1955, amendments were added to exact the tax, in the

case of a foreign corporation not qualified in Tennessee, or of a Tennessee corporation doing business under a revoked or suspended charter, as a recompense for protection afforded or benefits received from doing business in Tennessee. Secs. 67-2701, 67-2902, T. C. A. As so laid these taxes have been sustained by the Tennessee Supreme Court in a second case styled **Texas Gas Transmission Corp. v. Atkins**, 205 Tenn. 495, 327 S. W. 2d 305.

I.

The Decision Below Is Clearly Correct.

No extended argument is necessary to demonstrate that the Tennessee Supreme Court decision of this cause is wholly consonant with previous pronouncements of this Court, and in no wise contrary thereto. It was clearly recognized in **Southern National Gas Co. v. Alabama**, 301 U. S. 148, 81 L. Ed. 970, that a tax laid upon the right to exercise corporate functions in a state was not synonymous with one upon the actual doing of business.

In **Interstate National Gas Co. v. Stone**, certiorari denied 308 U. S. 522, 84 L. Ed. 442, the lower court had upheld a Mississippi franchise tax as against a foreign corporation doing only an interstate business. Though this Court wrote no opinion in the case, it did subsequently note in **Memphis Natural Gas Co. v. Stone**, 335 U. S. 80, 92 L. Ed. 1832, that it had considered the tax as one not on business but "on the privilege of exercising corporate functions within the State and its employment of its capital" in Mississippi.

What squarely controls the case at bar, however, is the decision proper in **Memphis Natural Gas Co. v. Stone.** Therein the taxpayer was an unqualified foreign corporation, engaged exclusively in interstate commerce. The sole

business was the operation of an interstate pipeline traversing one hundred thirty-five miles in Mississippi. Its only employees were those necessary to maintain the line and its auxiliary appurtenances.

The taxpayer resisted the payment of Mississippi's franchise tax on commerce clause grounds. The tax was laid

> ". . . upon every corporation . . . organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority now, or hereafter doing business within this state . . .
>
> . . . It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state."

The Supreme Court of Mississippi construed the tax as "an exaction which the State requires as a recompense for the protection of (local) activities carried on in this State by the corporation, foreign or domestic, activities which are incidental to the powers and privileges possessed by it in the nature of its organization—here the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of the system . . ." This Court held that it was bound by the construction accorded the Mississippi statute by the highest court of that State, and that as so construed the statute could not be held to be upon the privilege of engaging in interstate commerce.

A. The Instant Case Is Not Factually Distinguishable From Memphis Natural Gas v. Stone.

In the case at bar Appellant mans, maintains and operates an exclusively interstate pipeline and its auxiliary appurtenances, all in the exercise of its corporate functions and the powers and privileges afforded to it by the corporate form of organization. In the carrying out of these functions it receives protection from the State and benefits of a substantial nature.

Appellant stresses the fact that it neither buys nor sells, accepts nor delivers any products in Tennessee. Such was likewise true in **Memphis Natural Gas**, with the exception that there one wholesale customer existed in Mississippi. This fact, however, played no observable part in that decision. The latter was grounded upon the exercise by **Memphis Natural Gas** of corporate functions in Mississippi, not upon any alleged intrastate business carried on there. The nature or volume of any business transactions was obviously quite immaterial.

No other distinction of fact is suggested in the instant record. Appellant rather strives to establish that **Memphis Natural Gas** has been sapped of all precedential value by later decisions, chiefly **Spector Motor Service v. O'Connor**, 340 U. S. 602, 95 L. Ed. 573.

B. Spector Does Not Supersede Memphis Natural Gas.

Appellant in common with other multi-state corporations, interprets **Spector Motor Service v. O'Connor** quite broadly. That decision is seen as immunizing from all state privilege taxation all business concerns carrying on in a state only interstate commerce activities. Any other decision of this Court to the contrary of that interpretation is viewed as swept away. No such categorical effect can be ascribed to the **Spector** case.

What was involved in **Spector** was a Connecticut tax described by that State's highest court as "a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state," 340 U. S. 606, 95 L. Ed. 577. Where the operating incidence of the tax is the doing of business, and the business is exclusively interstate, then the judgment is obvious.

The Court then went on carefully to point out:

> "The State is not precluded from imposing taxes upon other activities or aspects of this business which unlike the privilege of doing interstate business, are subject to the sovereign power of the State."
>
> 340 U. S. 609, 95 L. Ed. 578.

The Mississippi tax in **Memphis Natural Gas** had been found to be for the protection of local activities incidental to peculiarly corporate powers and privileges, and upon that basis sustained. A tax upon a corporation for the privilege of doing business is manifestly not synonymous with one upon a corporation for exercising its function **in a corporate form and manner.** This distinction is one of substance and not of mere semantics.

Secondly, **Spector** did not purport to overrule **Memphis Natural Gas,** nor any other decision. Had this Court intended such a result it would doubtless have so stated in terms specific and unmistakable. Rather, it went to pains to point out that its conclusion was not in conflict with **Interstate Oil Pipeline v. Stone,** 337 U. S. 662, 93 L. Ed. 1613, **International Harvester Co. v. Evatt,** 329 U. S. 416, 91 L. Ed. 390, **Atlantic Lumber Co. v. Commissioner,** 298 U. S. 553, 80 L. Ed. 1328, **Central Greyhound Lines v. Mealey,** 334 U. S. 653, 92 L. Ed. 1633, and **Western Live Stock v. Bureau of Revenue,** 303 U. S. 250, 82 L. Ed. 823. Then it added:

"See also **Memphis Gas Co. v. Stone**, 335 U. S. 80, 92 L. Ed. 1832, 68 S. Ct. 1475, 340 U. S. 610, 95 L. Ed. 579."

C. **Recent Action of This Court Refutes Appellant's Contentions.**

At its last term this Court had presented to it a petition for certiorari challenging the imposition of a New Jersey tax identical in principle and circumstances of imposition to the situation in the case at bar. In **Roadway Express, Inc. v. Director**, 50 N. J. 471, 236 A. (2d) 577, appeal dismissed ... U. S. ..., 20 L. Ed. (2d) 276 for want of substantial federal question, an exclusively interstate trucking concern operating partly in New Jersey, but not qualified to do business there as a corporation, was subjected to the New Jersey franchise tax. The levy was resisted upon the basis of **Spector.**

The tax assailed was imposed *inter alia* "for the privilege of having or exercising its corporate franchise in (New Jersey)". The taxpayer had two terminals in the State, operated extensively over the highways, and maintained a substantial number of employees, but engaged in no intrastate hauling. It used the state courts to enforce and defend claims. The New Jersey Court conceded that the corporation engaged in no local activity which could be classified as intrastate, and that all activities were intimately connected with exclusively interstate commerce.

The New Jersey Supreme Court held (1) that the tax was not imposed upon the privilege of doing an interstate business, but upon other incidents within the power of the State to tax; and (2) that **Spector**, which it fully noted and discussed, should, in view of intervening decisions reflecting a changed philosophy on the part of this Court, be regarded as confined to its own precise facts. Upon this point it stated:

> "We have made these detailed references to the majority and dissenting points of view in **Spector** because we are convinced that the minority approach has since become the court's general view and that the later decisions demonstrate the case remains authority, at the very most, only in the precise statutory situation there found."

Appellee is of the opinion that the New Jersey tax was sustainable without regard to **Spector**, because imposed upon subject matter within a state's cognizance under the Constitution. He does not go so far as to suggest that **Spector** has no further value as precedent. He must observe, however, that if this Court had considered **Spector** to be as sweeping as does Appellant, most surely it would have taken jurisdiction in the **Roadway Express** case, either for the purpose of reversing the New Jersey Court or of reconciling other decisions in ostensible conflict with such a view. The observations of the New Jersey Court might indeed be regarded as an engraved invitation to this Court to grant certiorari.

This Court having declined that invitation, it is reasonably inferable at minimum that it does not regard **Spector** as proscribing state taxation of the exercise of a corporate franchise by an exclusively interstate business entity. Such an inference requires dismissal of the instant appeal.

It should further be noted that this Court's treatment of **Roadway Express** is wholly parallel to that given **Texas Gas Transmission Corp. v. Atkins**, supra, when review was sought of that decision in 1954 only three years after **Spector.** There the Tennessee Supreme Court had sustained the franchise and excise taxes as applied to a qualified foreign corporation found to be engaged solely in interstate commerce, holding the taxes to be upon the right to do business in corporate form rather than the

privilege of doing an interstate business. This Court denied certiorari. The only possible material difference between that case and the one at bar would be that Appellant is not qualified as a foreign corporation to transact business in Tennessee.

II.

There Is No Substantial Federal Question.

In addition to **Spector**, Appellant cites subsequent decisions of this Court as operating to proscribe the imposition of the taxes in question. All, however, simply go to the proposition that a state cannot under the commerce clause impose privilege taxes upon the doing of an exclusively interstate business, or carve out of that business local events which form the basis of such a tax. None hold that a State cannot make it a taxable privilege to exist or function as a corporation notwithstanding the interstate character of the corporate business.

It is not alleged that the taxes in question are discriminatory or unfairly apportioned; nor that they tax events beyond the territorial jurisdiction of Tennessee. While it is averred that they "severely burdened" Appellant's interstate commerce, the record shows that taxes similar in effect are paid to other states through which Appellant's line runs, where Appellant has qualified to carry on a corporate business. (See Schedule "P", Exhibits 5A and 6A to deposition of Witness Triece.) Likewise there is utterly no showing that prepayment of the taxes in question is a condition precedent to the right of Appellant to carry on its interstate business. To the contrary, collection is by ordinary means only. Nor is there revealed even minimal interference with the flow of interstate commerce.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the appeal herein is without merit and should be dismissed.

.....

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.....

MILTON P. RICE,
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State of Tennessee,
Counsel for Appellee.

Proof of Service.

I, Milton P. Rice, one of the attorneys for Appellee, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 2nd day of December, 1968, I served a copy of the foregoing Motion to Dismiss Appeal to the Supreme Court of the United States upon the Honorable H. Vincent E. Mitchell, of Squire, Sanders and Dempsey, 1800 Union Commerce Building, Cleveland, Ohio, one of the attorneys for Appellant herein, by mailing a copy thereof in a duly addressed envelope, U. S. postage prepaid.

.....

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Deputy Attorney General,
State of Tennessee.

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 756.

MID-VALLEY PIPELINE COMPANY,
Appellant,

vs.

DONALD R. KING, COMMISSIONER OF REVENUE,
Appellee.

MID-VALLEY PIPELINE COMPANY,
Appellant,

vs.

THOMAS D. BENSON, COMMISSIONER OF REVENUE,
Appellee.

(Three cases)

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL.

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In the Supreme Court of the United States

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MID-VALLEY PIPELINE COMPANY,
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MID-VALLEY PIPELINE COMPANY,
Appellant,

vs.

THOMAS D. BENSON, COMMISSIONER OF REVENUE,
Appellee.

(Three cases)

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL.

The argument of Appellee in support of its Motion to Dismiss the Appeal herein is based almost solely on the proposition that the Tennessee franchise and excise taxes are imposed upon "the privilege of doing business *in corporate form*" and are not predicated upon the nature or extent of Appellant's *local* activities, if any, in the state. In the opening paragraph of Appellee's Argument it is stated

> "Though Appellant has persistently and vigorously emphasized the interstate character of its business activities and their commerce clause immunity to Tennessee

taxation, the record shows that the predicate for the questioned taxes is not the character of Appellant's business, but the manner and form in which that business is conducted." (Appellee's Motion, page 5.)

Again at page 9 of Appellee's Motion it is stated:

"A tax upon a corporation for the privilege of doing business is manifestly not synonymous with one upon a corporation for exercising its function *in corporate form and manner*. This distinction is one of substance and not of mere semantics."

The Supreme Court of Tennessee, while referring in its opinion to the activities of Appellant in employing or owning capital or property in the state and maintaining its right of way and other valuable properties in the state and expressing the belief that "such local activities although incidental to the conduct of interstate commerce are taxable * * *", does not rest its decision on such premise. The second last paragraph of the opinion (Jurisdictional Statement, Appendix A, page 33) summarizes the Court's conclusion as follows:

"The taxes are imposed upon the privilege of doing business in corporate form and are nondiscriminatory as they apply to all foreign corporations doing business in this state in corporate form."

I.

THE TAXES CANNOT BE SUSTAINED IF PREDICATED SOLELY ON THE CORPORATE FORM OF APPELLANT.

It is submitted that interstate commerce should be entitled to the protection afforded by the Commerce Clause of the federal constitution whether carried on by an individual, a partnership or a corporation. The State of Tennessee cannot deny to a corporation the right to engage in an exclusively interstate business in that state.

Where interstate commerce only is involved, a state franchise or privilege tax upon the doing of business "in corporate form" is just as objectionable constitutionally as the Connecticut franchise tax stricken down by this Court in *Spector Motor Service vs. O'Connor*, 340 U. S. 602 (1951) which the Supreme Court of Connecticut had construed as follows:

> "The tax is then a tax or excise upon the *franchise* of *corporations* for the privilege of carrying on or doing business in the state, whether they be domestic or foreign * * *." (Emphasis supplied.)

If in fact the complaining corporation is engaged exclusively in interstate commerce then it would seem to be merely a matter of semantics whether the taxing statute is construed to be a franchise or excise tax upon the doing of business "in corporate form", or a franchise or excise tax upon the franchise of the corporation "for the privilege of carrying on or doing business."

Additionally, there is another phase of this case which the Appellee has either intentionally or unwittingly overlooked. This involves the difference in the wording of the Tennessee statutes with respect to the privilege or activities upon which the *franchise tax* is predicated and those upon which the *excise tax* is predicated. For the convenience of the Court the provisions of the corporate franchise tax applicable for the taxable years 1963 and 1964 is attached hereto as Appendix A, for the taxable years 1965 and 1966 as Appendix B. The provisions of the excise tax for the taxable years 1963 and 1964 are attached as Appendix C and the provisions of the excise tax for the taxable years 1965 and 1966 as Appendix D.

Section 67-2902, Tennessee Code Annotated (Appendix A and Appendix B hereto) imposing the franchise tax reads as follows:

"The tax hereby imposed shall be paid for the privilege of engaging in business in corporate form in this state and shall be in addition to all other taxes levied by any other statute."

Section 67-2701, Tennessee Code Annotated (Appendix C and Appendix D. hereto) imposing the excise tax reads as follows:

"Every such taxable entity * * * shall as a *recompense* for the protection of its local activities and as *compensation* for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter." (Emphasis supplied.)

Section 67-2902 (imposing the franchise tax) additionally contains the foregoing wording, but no reference is made in Section 67-2701 (imposing the excise tax) to "the privilege of engaging in business in corporate form in this state"—which is the language used in Section 67-2902 (imposing franchise tax). Notwithstanding this difference, the "corporate form" phrase is used by the Supreme Court of Tennessee as the basis of its decision as to *both* taxes.

The difference in the wording of the two Tennessee statutes makes it apparent that while "corporate form" may be significant in the proper construction of the *franchise tax* section it has no specific significance in the construction of the *excise tax* section—except that the imposition of both taxes is limited to corporations and certain other taxable entities. Thus, the activities of the Appellant in the State of Tennessee, and their separability from interstate commerce, must of necessity be brought into focus if *either* of the taxes are to be constitutionally sustained under the "recompense" and "compensation" clauses appearing in both sections of the Tennessee statutes.

The last mentioned clause does not define or enumerate the "local activities" which are supposed to be the predicate for the taxes. It does not detail (or even give examples of) the "benefits" which a corporation engaged exclusively in interstate commerce is supposed to receive "from doing business in Tennessee."

The Tennessee Supreme Court does not rest its decision on the "recompense" and "compensation" clauses. It devotes very little space in its opinion to the so-called "local activities" of Appellant and does not explain why such activities are sufficiently separable from interstate commerce as to justify the imposition of the privilege taxes.

II.

THE LOCAL ACTIVITIES OF APPELLANT ARE NOT SUCH AS TO JUSTIFY THE TAXES EITHER UNDER THE COMMERCE CLAUSE OR DUE PROCESS CLAUSE.

While this Court has given weight to the construction placed by the highest court of a state upon its privilege tax laws, in passing upon the question of constitutionality, this Court is not bound by a finding or determination of a state court that "local activities" are separable from the interstate commerce operations or are sufficiently localized to warrant state taxation. Furthermore this Court has repeatedly held that a state may not levy a privilege tax "on an integral part of interstate commerce." *Michigan-Wisconsin Pipe Line Co. vs. Calvert,* 347 U.S. 157, 166 (1954). See also *Joseph vs. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947); *Puget Sound Stevedoring Co. vs. Tax Commission,* 302 U.S. 9 (1937); *Richfield Oil Corporation vs. State Board,* 329 U.S. 69 (1946); *Murphy Steam Laundry Cleaner, Inc., vs. Stone,* 342 U.S. 389 (1952). Compare *State of Alaska vs. Arctic Maid et al.,* 366 U.S. 199 (1961).

In the case of *Joseph v. Carter & Weekes Stevedoring Co., supra,* this Court stated:

> "The *Puget Sound* opinion pointed out, p. 92 et seq., that transportation by water is impossible without loading and unloading."

It is equally true that *transportation by pipe line is impossible* without maintenance and operation of the pipe lines, pumping stations and micro wave communication system, which comprise the activities of the Appellant in Tennessee.

In view of the differences in the wording of the Tennessee statutes imposing the franchise tax and excise tax, respectively, it is submitted that in order to resolve the constitutional question as to each tax, separately, it is necessary for this Court to determine—

(a) in regard to the *franchise tax* whether Appellant may be subjected to a state privilege tax merely because it is a corporation without regard to whether

(i) it is engaged exclusively in interstate commerce,

(ii) if so, whether Appellant is conducting local activities within the state sufficiently separable from its interstate operations to form a nexus for a state privilege tax, and

(iii) whether such local activities have actually been made the predicate of the particular state privilege tax, and

(b) in regard to the *excise tax*

(i) whether Appellant is engaged in local activities sufficiently separable from interstate commerce, and

(ii) whether such local activities have actually been made the predicate of the excise tax.

In practically every case in which this Court has passed upon the constitutionality under the commerce clause of state privilege taxes (and state sales and use taxes) this Court has reviewed in detail the local activities of the taxpayer claiming to be engaged exclusively in interstate commerce. See *Spector Motor Service, Inc. vs. O'Connor,* 340 U.S. 602 (1951) and cases cited above.

In the *Spector* case this Court stated (page 609):

> "The State is not precluded from imposing taxes upon other activities or aspects of this (interstate) business which unlike the privilege of doing interstate business, are subject to the sovereign powers of the state."

In *General Motors Corporation vs. Washington, et al.,* 377 U.S. 436 (1963), involving the constitutionality of a Washington tax imposed upon the privilege of engaging in business activities in that state and measured by the gross wholesale sales of products delivered in that state, the Court stated:

> "The tax that Washington levied is measured by the wholesale sales of the respective General Motors Divisions in the State. It is unapportioned and as we have pointed out, is, therefore suspect. We must determine whether it is so closely related to the local activities of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax' *Miller Bros. vs. Maryland,* 347 U.S. 340, 344-345 (1954). On the basis of the facts found by the state court we are not prepared to say that its conclusion was constitutionally impermissible. *Norton Co. vs. Department of Revenue,* 340 U.S. 534 (1951), at page 538. Here just as in *Norton* the corporation so mingled its taxable business with that which it claims nontaxable that we can only 'conclude that in the light of all of the evidence' the judgment attributing

(the corporation's Washington sales to its local activity) was within the realm of permissible judgment."

It is true, as pointed out in Appellee's Motion, that this Court held constitutional a Mississippi privilege tax in *Memphis Natural Gas Co. vs. Stone,* 335 U.S. 80 (1948) which the State Supreme Court had held was imposed as a recompense as a protection for local activities carried on in Mississippi. The state statute enumerated certain local activities. In the *Memphis Natural Gas* case these consisted of maintaining, keeping in repair and otherwise in manning an interestate pipeline system. Actually the constitutionality of the tax was sustained on the theory that the tax levied was in substance an "additional ad valorem tax." This reasoning was severely criticised in the dissenting opinion of Justice Frankfurter and its applicability to any other set of facts has been questioned in subsequent decisions of this Court.

It is also true that *Spector* did not expressly overrule *Memphis Natural Gas* but as above stated this Court has in virtually all decisions subsequent to the *Spector* case, involving the constitutionality of the state privilege taxes, reviewed the local activities or incidents and has repeatedly stated that such claimed local activities must be *sufficiently separable and apart* from the Interstate Commerce activities *properly to form a nexus for the state privilege tax.* (*e.g. Michigan-Wisconsin Pipe Line Co. vs. Calvert, supra*). Such review of the factual situation would have been unnecessary were this Court now of the opinion that a state may constitutionally seize upon any local activity of a corporation engaged exclusively in interstate commerce and tax that activity. This Court does not appear willing to accept or approve such broad proposition and this is demonstrated by the decisions of this Court cited above.

Finally, in support of the contention that this Court should note jurisdiction in this Appeal, it was pointed out in Appellant's Jurisdictional Statement that there appears to be confusion among the highest courts of the several states with regard to the constitutionality of privilege taxes imposed upon companies engaged exclusively in interstate pipeline operations. (See cases cited in Jurisdictional Statement, page 22.)

More recently (May, 1968) the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana in a suit instituted by Colonial Pipe Line Company against Ashton J. Mouton, Collector of Revenue, held that a Louisiana statute imposing a privilege tax on that company was unconstitutional where its business activities in Louisiana consisted of the pipe line transportation of liquid fuels exclusively in interstate commerce. The court construed the Louisiana tax statute as follows:

> "It levies this tax for the privilege of carrying on or doing business, the *exercising of its charter* or the continuance of its charter in this state. In this Court's opinion where the record shows as it does in this case that the privilege of carrying on or doing business is here limited strictly to the privilege of carrying on or doing an interstate business, *the exercising of its charter* or the continuance of its charter within this state *deals with the charter of a corporation that is strictly engaged in interstate commerce.* (Emphasis supplied.)
>
> * * * * *
>
> To sum up, it is the opinion of this Court that the imposition of this tax to the facts found in this case is unconstitutional in that it violates the commerce clause of the Constitution of the United States."

The Louisiana Court's opinion is unreported. A copy is appended hereto as Appendix E.

A decision of this Court on the constitutional questions raised by this Appeal may illuminate the constitutional path for state courts in future pipeline privilege tax cases.

It is, therefore, respectfully submitted that the Motion to Dismiss should be denied and that jurisdiction should be noted herein.

Respectfully submitted,

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NOTE TO APPENDICES A, B, C AND D.

For the convenience of the court we have set forth below Appendices A, B, C and D. Appendix A represents the franchise tax relating to the taxable years 1963 and 1964, and Appendix C represents the excise tax relating to the taxable years 1963 and 1964. Appendix B represents the franchise tax relating to the taxable years 1965 and 1966, and Appendix D represents the excise tax relating to the taxable years 1965 and 1966.

The provisions of the franchise tax and excise tax set out in the appendices to the Jurisdictional Statement related to the year 1967 and were incomplete.

The text of Appendix A differs from that of Appendix B in that the penalty section, 67-2924, is different in each statute.

The text of Appendix C differs from that of Appendix D in that the penalty section, 67-2716, is different in each statute.

As between the years 1963-64 and 1965-66, there is no difference in the wording of the franchise and excise statutes, respectively, with respect to the right or privilege upon which each of the taxes is imposed.

APPENDIX A.

PROVISIONS OF TENNESSEE CODE ANNOTATED IMPOSING CORPORATE FRANCHISE TAX FOR TAXABLE YEARS 1963 AND 1964.

67-2901. Short title.—This chapter may be cited and referred to as "The Franchise Tax Law."

67-2902. Corporation subject to tax.—All corporations organized under the laws of this state, other than those organized for general welfare and not for profit, and all corporations organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception other than as provided in Section 67-2911, pay to the commissioner of revenue annually a privilege tax in addition to all other taxes, the rate and measure of which are hereinafter set forth. The tax hereby imposed shall be paid for the privilege of engaging in business in corporate form in this state and shall be in addition to all other taxes levied by any other statute.

Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing business within this state, without domesticating or qualifying to do business in this state, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter.

Any corporation organized under the laws of the state of Tennessee whose sole expressed corporate purpose is for the furthering of industrial development in communities throughout the state, and doing related matters thereto, and whose stockholders receive no income other than

interest or dividends on money invested in said corporation for constructing industrial buildings and whose officers receive no compensation shall be exempt from the payment of franchise and excise taxes.

The tax hereinbefore levied shall also be paid by all business trusts, commonly known as Massachusetts Trusts, for the privilege of doing business in Tennessee and the word "corporation" when used herein shall be deemed to include a business trust unless the particular context requires a different meaning.

67-2903. Corporations in receivership or trusteeship. —The tax imposed by this chapter shall apply to corporations whose business is being conducted by a receivership or trusteeship appointed by any court of competent jurisdiction and shall continue to accrue until such time as the corporation has been actually and legally dissolved or withdrawn from this state.

67-2904. Rate of tax.—The privilege tax hereby imposed shall be a tax of fifteen cents (15¢) on the one hundred dollars ($100), or major fraction thereof, of the issued and outstanding stock, surplus and undivided profits of each such corporation as shown by the books and records of such corporation at the close of its last fiscal year preceding the making of the sworn report hereinafter required.

67-2905. State purposes only.—The tax herein levied shall be a tax for state purposes only and no county or municipality shall have the power to levy a similar tax.

67-2906. Tax reduced for impairment of capital.— Where a corporation doing business without surplus or undivided profits has had the value of its capital stock impaired by operating deficits or other business losses, such as fire, flood, tornado, etc., and where such deficit or

loss is carried upon the books and records of the corporation as an impairment of capital, the measure of the tax shall be diminished by such loss or deficit.

67-2907. Reduction of tax for stock held by another taxpaying corporation.—The value of the stock held by any corporation in any other corporation paying the tax herein levied and actually doing business in this state shall be deducted from the measure of the tax of the first corporation.

67-2908. Inclusion of debt owed to or guaranteed by affiliate.—If the capital stock of a corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership is inadequate for its business needs apart from credit extended or indebtedness guaranteed by the parent or an affiliated corporation, in determining the amount of capital, surplus and undivided profits of such corporation with respect to its liability for the tax imposed by this chapter, there shall be included in the measure of the tax the indebtedness owed to or guaranteed by the parent or an affiliated corporation. If necessary to apportion such indebtedness the methods of allocation hereinafter set forth shall be used.

67-2909. Value of tangible property as minimum tax base.—The measure of the tax hereby imposed shall in no case be less than the actual value of property owned, or property used, in Tennessee. In cases where part or all of the property is rented the actual value of property will be deemed to be the book value of all property owned as shown by the books and records of such corporation at the close of its last fiscal year preceding the making of the sworn report hereinafter required (excepting books with respect to investment costs kept pursuant to regulations of the interstate commerce commission) plus the value of

the rental property used which shall be determined by multiplying the net annual rental by the following multiples:

	Multiples
(a) Real property	5
(b) Machinery and equipment used in manufacturing and processing	3
(c) Furniture, office machinery and equipment	2
(d) Delivery or mobile equipment	1

The "net annual rental" shall mean the gross annual rental paid by the taxpayer less the gross rental received by the taxpayer for sub-rental. For the purposes of this section the term "used" shall mean only such property as is actually utilized by the corporation in the conduct of its principal business.

67-2910. Minimum tax.—The minimum tax payable under this chapter shall be ten dollars ($10.00).

67-2911. Credit for insurance premiums tax.—There shall be credited upon the tax hereby imposed such net amounts as are paid by insurance companies to this state as a tax upon gross premiums collected by them, not including the gross premium receipts tax paid by fire insurance companies for the purpose of executing the fire marshal law. There shall be no other credits.

67-2912. Apportionment of capital of corporations doing business outside state.—In the case of corporations doing business in Tennessee and elsewhere the measure of the tax as herein above set forth shall be apportioned to Tennessee for the purpose of taxation in the manner set forth in Sections 67-2913—67-2918.

67-2913. Apportionment of manufacturers' and processors' capital.—If the principal business in this state is

manufacturing or if it is any form of collecting, assembling or processing of goods or materials, or if it is constructing or improving real property for others, the capital stock, surplus and undivided profits shall be apportioned to Tennessee on the basis of the ratio obtained by taking the arithmetical average of the following two (2) ratios:

(a) The ratio of the value of its real estate and tangible personal property in this state on the date of the close of the fiscal year, to the value of its entire real estate and tangible personal property, with no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of manufacturing, collecting, assembling or processing within this state, to the total cost of manufacturing, collecting, assembling or processing within and without the state.

67-2914. Apportionment of dealers' capital.—If the principal business in this state is selling, distributing, dealing in or using tangible personal property, the capital stock, surplus and undivided profits shall be apportioned to Tennessee on the basis of the ratio obtained by taking the arithmetical average of the following two (2) ratios:

(a) The ratio of the value of its real estate and tangible personal property in this state on the day of the close of its fiscal year, to the value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, public or private warehouses, or branches located in Tennessee during the income year to the total sales made everywhere during said year.

67-2915. Apportionment of common carriers' capital. —If the principal business in this state is that of a common

carrier of persons or property for hire, then on the basis of the appropriate ratio as follows:

(a) RAILROADS.—The ratio obtained by taking the arithmetical average of the following two (2) ratios:

1. The gross receipts from railway operations on business beginning and ending within this state without entering or passing through any other state as compared with its entire gross receipts from such operations within and without the state.

2. The mileage owned and operated within Tennessee plus mileage leased and operated within Tennessee as compared with the total of such mileage within and without this state.

(b) MOTOR CARRIERS.—The ratio obtained by taking the arithmetical average of the following two (2) ratios:

1. The gross receipts from operations on business beginning and ending within this state without entering or passing through any other state as compared with its entire gross receipts from such operations within and without the state.

2. The ratio of the total franchise miles to which it holds or uses under lease, contract or otherwise, certificates of convenience and necessity from the interstate commerce commission of the United States or the railroad and public utilities commission of Tennessee within the state, to the total franchise miles which it holds or uses under such certificates from said commissions, and like commissions or agencies of other states, within and without the state, all as shown by the annual reports made by said corporation to the various commissions from which it holds certificates.

(c) RAIL AND MOTOR CARRIERS.—Where the corporation is engaged in transporting passengers and

property by both rail and motor, then the ratio of the sum of the miles within the state as computed under paragraphs (a) and (b) above, to the sum of the miles under said paragraphs within and without the state.

(d) PIPELINES.—The ratio obtained by taking the arithmetical average of the following two (2) ratios:

1. The gross receipts from operations on business beginning and ending within this state without entering or passing through any other state as compared with its entire gross receipts from such operations within and without the state.

2. The ratio of the pipeline miles owned or operated or owned and operated within the state, to the miles of pipelines owned or operated or owned and operated within and without the state.

67-2916. Apportionment of capital on basis of gross receipts.—If the principal business is other than the manufacture or sale of tangible property or that of a common carrier of persons or property for hire, such proportion as its gross receipts in Tennessee during the income year is to its gross receipts for such year within and without the state.

67-2917. Variation from standard apportionment formulas.—If the apportionment provisions of this law do not fairly represent the extent of the taxpayer's business activity in this state, because of peculiar or unusual circumstances inherent in a particular case and create a hardship or injustice, the commissioner, upon application of the taxpayer and upon such showing, is authorized with the approval of the attorney-general, to adopt such other method of apportionment as would be fair and just under the facts of the case.

Provided, however, that when such other method of apportionment has once been established, it shall continue in effect so long as the peculiar or unusual circumstances remain substantially unchanged. In the event of federal legislation that would proscribe present Tennessee statutory formulas the commissioner of revenue, with the approval of the attorney-general, may adopt such alternate formulas as would be consistent with the federal legislation.

67-2918. Apportioned capital as basis for tax.—When corporations are doing business in Tennessee and elsewhere, only that part of the capital, surplus and undivided profits properly allocable to Tennessee by the manner of apportionment set forth in Sections 67-2913—67-2917, shall be used as a measure of the tax subject to the other provisions of this chapter with reference to a minimum measure and minimum tax.

67-2919. Administration—Rules and regulations.—The administration of this chapter and the collection of the tax herein levied are vested in the commissioner of finance and taxation who shall have the power to employ such persons as may be necessary in the administration of this chapter. There is apportioned annually an amount equal to two per cent (2%) of the receipts derived from the proceeds of the tax for the purpose of administering this chapter.

The commissioner of finance and taxation is granted full power and authority to adopt such reasonable rules and regulations, not in conflict with this or other statutes, as he may deem necessary to enforce the collection of the tax herein levied. Such rules and regulations, before being effective, shall be approved by the attorney-general and shall be printed. A copy of such rules and regulations shall

be furnished any interested party upon application and shall accompany the annual report form required to be filed under this chapter.

67-2920. Annual report—Contents.—Every corporation liable for the tax here imposed shall file with the commissioner of revenue on such form as he may prescribe an accurate and complete report, signed by its president or other principal officer under penalty of perjury, which report shall contain the following data:

(a) The name of the corporation, the state in which chartered, the location of its principal place of business in this state and the location of its principal or home office.

(b) The amount of capital stock subscribed and paid in, the amount issued and outstanding, the amount of surplus and undivided profits, together with the book value of each share of such stock as shown by the books and records of the corporation at the close of its last fiscal year.

(c) A comparative balance sheet as of the beginning and close of the last fiscal year as shown by the books and records of the corporation.

(d) Such other and further information as may be required by the commissioner for the reasonable enforcement of this chapter.

By the enumeration of the specific data required above it is not intended to divest the commissioner of his right to require all information which he may deem necessary for the enforcement of this chapter.

All reports must be filed with the commissioner of revenue on or before the first day of the fourth month following the close of taxpayer's fiscal year. The tax must be paid to the department of revenue at the time of filing the report.

67-2921. Reports confidential.—Reports of corporations made hereunder shall be confidential and shall not be divulged by the commissioner or his assistants except to a legislative committee appointed for the purpose of examining them, to the governor, to the attorney-general, or in obedience to a court order. If the commissioner of finance and taxation or any employee, or any person to whom such information is divulged, should divulge the contents of any report except in accordance with the foregoing exceptions, he shall be guilty of a misdemeanor and punished accordingly.

67-2922. Payment of tax—Examination of reports—Adjustment of payments.—The tax herein levied shall be paid to the department of revenue at the time the sworn report is filed. The commissioner of revenue shall examine every sworn report as promptly as possible and shall ascertain whether the tax payment which accompanies such report is the amount actually and lawfully owing by the taxpayer. If the payment tendered is insufficient, the commissioner of revenue shall determine the correct tax due and shall immediately notify the taxpayer of the balance due, together with any interest and penalty thereon. If the amount tendered is in excess of the correct liability under this chapter, the commissioner, with the approval of the attorney-general, shall return the amount of such excess to the taxpayer by state warrant, as in the case of other refunds.

67-2923. Access to records—Subpoena.—The commissioner of finance and taxation or his duly authorized agent shall have access to all books and records of corporations required to pay tax hereunder, to enable the commissioner to ascertain the correctness of any fact or report made or herein required. In the event any corporation

fails or refuses to permit the commissioner or his agent to have access to necessary books and information, then the commissioner shall have power and authority to compel the attendance of witnesses and the production of books and papers in the same manner as process may now be issued by the courts to compel the attendance of witnesses and the production of books and papers. Such process shall run anywhere in the state and shall be served by the sheriff or any lawful officer to whom it may be directed. Disobedience to such process shall be treated as contempt of court and may be punished as such on the petition of the commissioner to the chancery court of the county to which such process is directed.

67-2924. Penalty and interest—Extension of time.—Any corporation delinquent in the filing of the report herein required or in the payment of the tax herein levied shall pay a penalty of ten per cent (10%) for the first month or fractional part thereof of delinquency, and penalty thereafter at the rate of one half of one per cent (½%) of the amount due for each month of such delinquency.

Provided, that the commissioner of revenue shall have authority in the exercise of his discretion, for good cause shown, to grant an extension of time to the taxpayer to file report and pay the tax herein imposed, without penalty attaching, but the tax shall bear interest as herein provided from due date until paid. The penalties as herein provided shall be paid by the taxpayer unless the tax and interest thereon shall be paid on or before the expiration date of the extension.

67-2925. Revocation of charter for nonpayment of tax.—The commissioner of revenue shall certify to the secretary of state the name of any corporation which fails or refuses to file the report and to pay the tax herein re-

quired in all cases where such report and tax payment have not been made within ninety (90) days after due date. At the time of such certification to the secretary of state, the commissioner of revenue shall give notice to the corporation of the action taken. Thereupon the charter of such corporation or its domestication in Tennessee shall stand as automatically revoked and the secretary of state shall note such revocation upon his records. At any time after date of revocation such charter may be reinstated upon the filing of all reports and the payment of all fees, taxes, penalty and interest due the state, provided, however, the title has not been taken by another corporation, and further provided that proof be furnished sufficient to the commissioner that no third party will be injured by such reinstatement.

67-2926. Injunction from doing business.—Any corporation subject to the tax herein levied which shall be delinquent in filing this report or in paying this tax may be enjoined from doing business in this state in a suit brought in the name of the state by the attorney-general.

67-2927. Assessment of tax without report.—In addition to the penalty and interest heretofore provided, the commissioner is authorized, in the case of any corporation failing or refusing to make report and to pay tax, to ascertain the tax liability of such corporation from any information available and to give notice of the amount of such tax liability to the corporation forthwith by registered mail. After being so notified, any corporation shall pay the tax assessed against it and if it contests the legality thereof must proceed in accordance with Section 67-2931.

67-2928. Lien against property.—The tax herein levied shall be a lien upon all the property of such taxpayer against whom the same is assessed located in this

state and shall be inferior only to state and county ad valorem taxes and to existing liens created by contracts, but it shall be superior to any renewals of existing contract liens.

67-2929. Distress warrant.—The commissioner of revenue is empowered, and it shall be his duty, to issue a distress warrant for the collection of the franchise tax, interest and penalty due from any corporation delinquent for sixty (60) days. Said distress warrant may be addressed and delivered to the sheriff of the county wherein such delinquent corporation has its principal office or place of business in Tennessee, or to the sheriff of any county in which the commissioner has reason to believe property of such delinquent corporation may be found.

The sheriff into whose hands such warrant may come, or his deputy, may execute same by distraint and sale of personal property belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation and the proceedings in respect thereto shall be the same as are provided by law for proceedings under an execution at law from a court of record; and the executing officer shall be entitled to the same fees, commissions and necessary expense of removing and keeping property distrained as in case of an execution from a court of record.

If the officer cannot find personal property to satisfy said distress warrant, he may levy same upon any real estate in his county belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation, and if levied on land, said distress warrant, together with the officer's return thereon, shall be returned to the circuit court of the county wherein the land lies, and the land shall be condemned and sold under the orders of

said circuit court in the same manner as in case of the levy on land of an execution issued by a justice of the peace.

67-2930. Suit for collection of tax.—The commissioner may at his option bring suit in any court of competent jurisdiction against a delinquent taxpayer for the collection of the tax, interest and penalties herein provided.

67-2931. Action to recover tax paid under protest—Injunction of collection prohibited.—Whenever any corporation conceives that any tax demanded by the commissioner of finance and taxation under the supposed authority of this chapter is illegal or not due it shall be the duty of the corporation to pay the tax and to challenge the legality or correctness thereof in a suit instituted in accordance with Sections 67-2303—67-2312. In such suit for the recovery of a tax paid all questions of law and fact with reference to the illegality of the tax may be raised. No corporation shall be entitled to enjoin the commissioner of finance and taxation from collecting any tax demanded by such collecting officer under the authority of this chapter and no such injunction shall issue under the guise of enjoining an assessment or a collection. The sole remedy of the taxpayer shall be a suit to recover the tax alleged to have been illegally collected or demanded. In such suit the commissioner shall not be permitted to defend upon the ground that the payment was not made under duress. In any case where a court of competent jurisdiction shall decree a recovery of a tax herein such court shall be authorized to allow interest from the date of the payment to the date of the judgment at a rate not exceeding six per cent (6%) per annum.

The provisions of this section with reference to payment under protest and with reference to no injunctive

relief shall apply to taxes demanded by the commissioner where the original payment of the corporation was alleged to be insufficient as well as to taxes assessed by the commissioner in the absence of the sworn report or statement required.

The time for filing suits for the recovery of allegedly illegal taxes and the procedure in such suits shall be governed by Sections 67-2303—67-2312.

APPENDIX B.

PROVISIONS OF TENNESSEE CODE ANNOTATED IMPOSING CORPORATE FRANCHISE TAX FOR TAXABLE YEARS 1965 AND 1966.

67-2901. Short title.—This chapter may be cited and referred to as "The Franchise Tax Law."

67-2902. Corporations subject to tax.—All corporations organized under the laws of this state, other than those organized for general welfare and not for profit, and all corporations organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception other than as provided in Section 67-2911, pay to the commissioner of revenue annually a privilege tax in addition to all other taxes, the rate and measure of which are hereinafter set forth. The tax hereby imposed shall be paid for the privilege of engaging in business in corporate form in this state and shall be in addition to all other taxes levied by any other statute.

Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing busi-

ness within this state, without domesticating or qualifying to do business in this state, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter.

Any corporation organized under the laws of the state of Tennessee whose sole expressed corporate purpose is for the furthering of industrial development in communities throughout the state, and doing related matters thereto, and whose stockholders receive no income other than interest or dividends on money invested in said corporation for constructing industrial buildings and whose officers receive no compensation shall be exempt from the payment of franchise and excise taxes.

The tax hereinbefore levied shall also be paid by all business trusts, commonly known as Massachusetts Trusts, for the privilege of doing business in Tennessee and the word "corporation" when used herein shall be deemed to include a business trust unless the particular context requires a different meaning.

67-2903. Corporations in receivership or trusteeship. —The tax imposed by this chapter shall apply to corporations whose business is being conducted by a receivership or trusteeship appointed by any court of competent jurisdiction and shall continue to accrue until such time as the corporation has been actually and legally dissolved or withdrawn from this state.

67-2904. Rate of tax.—The privilege tax hereby imposed shall be a tax of fifteen cents (15¢) on the one hundred dollars ($100), or major fraction thereof, of the issued and outstanding stock, surplus and undivided profits of each such corporation as shown by the books and

records of such corporation at the close of its last fiscal year preceding the making of the sworn report hereinafter required.

67-2905. State purposes only.—The tax herein levied shall be a tax for state purposes only and no county or municipality shall have the power to levy a similar tax.

67-2906. Tax reduced for impairment of capital.—Where a corporation doing business without surplus or undivided profits has had the value of its capital stock impaired by operating deficits or other business losses, such as fire, flood, tornado, etc., and where such deficit or loss is carried upon the books and records of the corporation as an impairment of capital, the measure of the tax shall be diminished by such loss or deficit.

67-2907. Reduction of tax for stock held by another taxpaying corporation.—The value of the stock held by any corporation in any other corporation paying the tax herein levied and actually doing business in this state shall be deducted from the measure of the tax of the first corporation.

67-2908. Inclusion of debt owed to or guaranteed by affiliate.—If the capital stock of a corporation which is a subsidiary of another corporation or closely affiliated therewith by stock ownership is inadequate for its business needs apart from credit extended or indebtedness guaranteed by the parent or an affiliated corporation, in determining the amount of capital, surplus and undivided profits of such corporation with respect to its liability for the tax imposed by this chapter, there shall be included in the measure of the tax the indebtedness owed to or guaranteed by the parent or an affiliated corporation. If necessary to apportion such indebtedness the methods of allocation hereinafter set forth shall be used.

67-2909. Value of tangible property as minimum tax base.—The measure of the tax hereby imposed shall in no case be less than the actual value of property owned, or property used, in Tennessee. In cases where part or all of the property is rented the actual value of property will be deemed to be the book value of all property owned as shown by the books and records of such corporation at the close of its last fiscal year preceding the making of the sworn report hereinafter required (excepting books with respect to investment costs kept pursuant to regulations of the interstate commerce commission) plus the value of the rental property used which shall be determined by multiplying the net annual rental by the following multiples:

		Multiples
(a)	Real property	5
(b)	Machinery and equipment used in manufacturing and processing	3
(c)	Furniture, office machinery and equipment	2
(d)	Delivery or mobile equipment	1

The "net annual rental" shall mean the gross annual rental paid by the taxpayer less the gross rental received by the taxpayer for sub-rental. For the purposes of this section the term "used" shall mean only such property as is actually utilized by the corporation in the conduct of its principal business.

67-2910. Minimum tax.—The minimum tax payable under this chapter shall be ten dollars ($10.00).

67-2911. Credit for insurance premiums tax.—There shall be credited upon the tax hereby imposed such net amounts as are paid by insurance companies to this state

as a tax upon gross premiums collected by them, not including the gross premium receipts tax paid by fire insurance companies for the purpose of executing the fire marshal law. There shall be no other credits.

67-2912. Apportionment of capital of corporations doing business outside state.—In the case of corporations doing business in Tennessee and elsewhere the measure of the tax as herein above set forth shall be apportioned to Tennessee for the purpose of taxation in the manner set forth in Sections 67-2913—67-2918.

67-2913. Apportionment of manufacturers' and processors' capital.—If the principal business in this state is manufacturing or if it is any form of collecting, assembling or processing of goods or materials, or if it is constructing or improving real property for others, the capital stock, surplus and undivided profits shall be apportioned to Tennessee on the basis of the ratio obtained by taking the arithmetical average of the following two (2) ratios:

(a) The ratio of the value of its real estate and tangible personal property in this state on the date of the close of the fiscal year, to the value of its entire real estate and tangible personal property, with no deductions on account of encumbrances thereon.

(b) The ratio of the total cost of manufacturing, collecting, assembling or processing within this state, to the total cost of manufacturing, collecting, assembling or processing within and without the state.

67-2914. Apportionment of dealers' capital.—If the principal business in this state is selling, distributing, dealing in or using tangible personal property, the capital stock, surplus and undivided profits shall be apportioned to Tennessee on the basis of the ratio obtained by taking the arithmetical average of the following two (2) ratios:

(a) The ratio of the value of its real estate and tangible personal property in this state on the day of the close of its fiscal year, to the value of its entire real estate and tangible personal property then owned by it, with no deductions on account of encumbrances thereon.

(b) The ratio of the total sales made through or by offices, agencies, public or private warehouses, or branches located in Tennessee during the ~~income~~ year to the total sales made everywhere during said year.

67-2915. Apportionment of common carriers' capital.—If the principal business in this state is that of a common carrier of persons or property for hire, then on the basis of the appropriate ratio as follows:

(a) RAILROADS.—The ratio obtained by taking the arithmetical average of the following two (2) ratios:

1. The gross receipts from railway operations on business beginning and ending within this state without entering or passing through any other state as compared with its entire gross receipts from such operations within and without the state.

2. The mileage owned and operated within Tennessee plus mileage leased and operated within Tennessee as compared with the total of such mileage within and without this state.

(b) MOTOR CARRIERS.—The ratio obtained by taking the arithmetical average of the following two (2) ratios:

1. The gross receipts from operations on business beginning and ending within this state without entering or passing through any other state as compared with its entire gross receipts from such operations within and without the state.

2. The ratio of the total franchise miles to which it holds or uses under lease, contract or otherwise, certificates of convenience and necessity from the interstate commerce commission of the United States or the railroad and public utilities commission of Tennessee within the state, to the total franchise miles which it holds or uses under such certificates from said commissions, and like commissions or agencies of other states, within and without the state, all as shown by the annual reports made by said corporation to the various commissions from which it holds certificates.

(c) RAIL AND MOTOR CARRIERS.—Where the corporation is engaged in transporting passengers and property by both rail and motor, then the ratio of the sum of the miles within the state as computed under paragraphs (a) and (b) above, to the sum of the miles under said paragraphs within and without the state.

(d) PIPELINES.—The ratio obtained by taking the arithmetical average of the following two (2) ratios:

1. The gross receipts from operations on business beginning and ending within this state without entering or passing through any other state as compared with its entire gross receipts from such operations within and without the state.

2. The ratio of the pipeline miles owned or operated or owned and operated within the state, to the miles of pipelines owned or operated or owned and operated within and without the state.

67-2916. Apportionment of capital on basis of gross receipts.—If the principal business is other than the manufacture or sale of tangible property or that of a common carrier of persons or property for hire, such proportion as its gross receipts in Tennessee during the income year

is to its gross receipts for such year within and without the state.

67-2917. Variation from standard apportionment formulas.—If the apportionment provisions of this law do not fairly represent the extent of the taxpayer's business activity in this state, because of peculiar or unusual circumstances inherent in a particular case and create a hardship or injustice, the commissioner, upon application of the taxpayer and upon such showing, is authorized with the approval of the attorney-general, to adopt such other method of apportionment as would be fair and just under the facts of the case.

Provided, however, that when such other method of apportionment has once been established, it shall continue in effect so long as the peculiar or unusual circumstances remain substantially unchanged. In the event of federal legislation that would proscribe present Tennessee statutory formulas the commissioner of revenue, with the approval of the attorney-general, may adopt such alternate formulas as would be consistent with the federal legislation.

67-2918. Apportioned capital as basis for tax.—When corporations are doing business in Tennessee and elsewhere, only that part of the capital, surplus and undivided profits properly allocable to Tennessee by the manner of apportionment set forth in Sections 67-2913—67-2917, shall be used as a measure of the tax subject to the other provisions of this chapter with reference to a minimum measure and minimum tax.

67-2919. Administration—Rules and regulations.—The administration of this chapter and the collection of the tax herein levied are vested in the commissioner of finance and taxation who shall have the power to employ such per-

sons as may be necessary in the administration of this chapter. There is apportioned annually an amount equal to two per cent (2%) of the receipts derived from the proceeds of the tax for the purpose of administering this chapter.

The commissioner of finance and taxation is granted full power and authority to adopt such reasonable rules and regulations, not in conflict with this or other statutes, as he may deem necessary to enforce the collection of the tax herein levied. Such rules and regulations, before being effective, shall be approved by the attorney-general and shall be printed. A copy of such rules and regulations shall be furnished any interested party upon application and shall accompany the annual report form required to be filed under this chapter.

67-2920. Annual report—Contents.—Every corporation liable for the tax here imposed shall file with the commissioner of revenue on such form as he may prescribe an accurate and complete report, signed by its president or other principal officer under penalty of perjury, which report shall contain the following data:

(a) The name of the corporation, the state in which chartered, the location of its principal place of business in this state and the location of its principal or home office.

(b) The amount of capital stock subscribed and paid in, the amount issued and outstanding, the amount of surplus and undivided profits, together with the book value of each share of such stock as shown by the books and records of the corporation at the close of its last fiscal year.

(c) A comparative balance sheet as of the beginning and close of the last fiscal year as shown by the books and records of the corporation.

(d) Such other and further information as may be required by the commissioner for the reasonable enforcement of this chapter.

By the enumeration of the specific data required above it is not intended to divest the commissioner of his right to require all information which he may deem necessary for the enforcement of this chapter.

All reports must be filed with the commissioner of revenue on or before the first day of the fourth month following the close of taxpayer's fiscal year. The tax must be paid to the department of revenue at the time of filing the report.

67-2921. Reports confidential.—Reports of corporations made hereunder shall be confidential and shall not be divulged by the commissioner or his assistants except to a legislative committee appointed for the purpose of examining them, to the governor, to the attorney-general, or in obedience to a court order. If the commissioner of finance and taxation or any employee, or any person to whom such information is divulged, should divulge the contents of any report except in accordance with the foregoing exceptions, he shall be guilty of a misdemeanor and punished accordingly.

67-2922. Payment of tax—Examination of reports—Adjustment of payments.—The tax herein levied shall be paid to the department of revenue at the time the sworn report is filed. The commissioner of revenue shall examine every sworn report as promptly as possible and shall ascertain whether the tax payment which accompanies such report is the amount actually and lawfully owing by the taxpayer. If the payment tendered is insufficient, the commissioner of revenue shall determine the correct tax due and shall immediately notify the tax-

payer of the balance due, together with any interest and penalty thereon. If the amount tendered is in excess of the correct liability under this chapter, the commissioner, with the approval of the attorney-general, shall return the amount of such excess to the taxpayer by state warrant, as in the case of other refunds.

67-2923. Access to records—Subpoena.—The Commissioner of finance and taxation or his duly authorized agent shall have access to all books and records of corporations required to pay tax hereunder, to enable the commissioner to ascertain the correctness of any fact or report made or herein required. In the event any corporation fails or refuses to permit the commissioner or his agent to have access to necessary books and information, then the commissioner shall have power and authority to compel the attendance of witnesses and the production of books and papers in the same manner as process may now be issued by the courts to compel the attendance of witnesses and the production of books and papers. Such process shall run anywhere in the state and shall be served by the sheriff or any lawful officer to whom it may be directed. Disobedience to such process shall be treated as contempt of court and may be punished as such on the petition of the commissioner to the chancery court of the county to which such process is directed.

67-2924. Penalty and interest—Extension of time. —Any corporation delinquent in filing the report herein required or in payment of the tax herein levied shall pay a penalty of five per cent (5%) for the first month or fractional part thereof of delinquency, provided, however, that should the period of delinquency exceed one (1) month the rate of penalty will be an additional five per cent (5%) for the second month or fractional part thereof and penalty thereafter at the rate of one-half of

one per cent (½ of 1%) per month of the amount of tax due. All delinquency shall bear interest at the rate of six per cent (6%) per annum from due date until paid. The penalty and interest herein provided for shall apply to any part of the tax unpaid by due date and no such penalty or interest can be waived.

Provided, that the commissioner of revenue shall have authority in the exercise of his discretion, for good cause shown, to grant an extension of time to the taxpayer to file report and pay the tax herein imposed, without penalty attaching, but the tax shall bear interest as herein provided from due date until paid. The penalties as herein provided shall be paid by the taxpayer unless the tax and interest thereon shall be paid on or before the expiration date of the extension.

67-2925. Revocation of charter for nonpayment of tax.—The commissioner of revenue shall certify to the secretary of state the name of any corporation which fails or refuses to file the report and to pay the tax herein required in all cases where such report and tax payment have not been made within ninety (90) days after due date. At the time of such certification to the secretary of state, the commissioner of revenue shall give notice to the corporation of the action taken. Thereupon the charter of such corporation or its domestication in Tennessee shall stand as automatically revoked and the secretary of state shall note such revocation upon his records. At any time after date of revocation such charter may be reinstated upon the filing of all reports and the payment of all fees, taxes, penalty and interest due the state, provided, however, the title has not been taken by another corporation, and further provided that proof be furnished sufficient to the commissioner that no third party will be injured by such reinstatement.

67-2926. Injunction from doing business.—Any corporation subject to the tax herein levied which shall be delinquent in filing this report or in paying this tax may be enjoined from doing business in this state in a suit brought in the name of the state by the attorney-general.

67-2927. Assessment of tax without report.—In addition to the penalty and interest heretofore provided, the commissioner is authorized, in the case of any corporation failing or refusing to make report and to pay tax, to ascertain the tax liability of such corporation from any information available and to give notice of the amount of such tax liability to the corporation forthwith by registered mail. After being so notified, any corporation shall pay the tax assessed against it and if it contests the legality thereof must proceed in accordance with Section 67-2941.

67-2928. Lien against property.—The tax herein levied shall be a lien upon all the property of such taxpayer against whom the same is assessed located in this state and shall be inferior only to state and county ad valorem taxes and to existing liens created by contracts, but it shall be superior to any renewals of existing contract liens.

67-2929. Distress warrant.—The commissioner of revenue is empowered, and it shall be his duty, to issue a distress warrant for the collection of the franchise tax, interest and penalty due from any corporation delinquent for sixty (60) days. Said distress warrant may be addressed and delivered to the sheriff of the county wherein such delinquent corporation has its principal office or place of business in Tennessee, or to the sheriff of any county in which the commissioner has reason to believe property of such delinquent corporation may be found.

The sheriff into whose hands such warrant may come, or his deputy, may execute same by distraint and sale of

personal property belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation and the proceedings in respect thereto shall be the same as are provided by law for proceedings under an execution at law from a court of record; and the executing officer shall be entitled to the same fees, commissions and necessary expense of removing and keeping property distrained as in case of an execution from a court of record.

If the officer cannot find personal property to satisfy said distress warrant, he may levy same upon any real estate in his county belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation, and if levied on land, said distress warrant, together with the officer's return thereon, shall be returned to the circuit court of the county wherein the land lies, and the land shall be condemned and sold under the orders of said circuit court in the same manner as in case of the levy on land of an execution issued by a justice of the peace.

67-2930. Suit for collection of tax.—The commissioner may at his option bring suit in any court of competent jurisdiction against a delinquent taxpayer for the collection of the tax, interest and penalties herein provided.

67-2931. Action to recover tax paid under protest—Injunction of collection prohibited.—Whenever any corporation conceives that any tax demanded by the commissioner of finance and taxation under the supposed authority of this chapter is illegal or not due it shall be the duty of the corporation to pay the tax and to challenge the legality or correctness thereof in a suit instituted in accordance with Sections 67-2303—67-2312. In such suit for the re-

covery of a tax paid all questions of law and fact with reference to the illegality of the tax may be raised. No corporation shall be entitled to enjoin the commissioner of finance and taxation from collecting any tax demanded by such collecting officer under the authority of this chapter and no such injunction shall issue under the guise of enjoining an assessment or a collection. The sole remedy of the taxpayer shall be a suit to recover the tax alleged to have been illegally collected or demanded. In such suit the commissioner shall not be permitted to defend upon the ground that the payment was not made under duress. In any case where a court of competent jurisdiction shall decree a recovery of a tax herein such court shall be authorized to allow interest from the date of the payment to the date of the judgment at a rate not exceeding six per cent (6%) per annum.

The provisions of this section with reference to payment under protest and with reference to no injunctive relief shall apply to taxes demanded by the commissioner where the original payment of the corporation was alleged to be insufficient as well as to taxes assessed by the commissioner in the absence of the sworn report or statement required.

The time for filing suits for the recovery of allegedly illegal taxes and the procedure in such suits shall be governed by Sections 67-2303—67-2312.

APPENDIX C.

PROVISIONS OF TENNESSEE CODE ANNOTATED IMPOSING EXCISE TAX FOR TAXABLE YEARS 1963 AND 1964.

67-2701. Corporations subject to tax—Rate.—All corporations, cooperatives conducted for profit, joint-stock associations and business trusts, organized under the laws of this state, other than those organized for general welfare and not for profit, and all such entities organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception, pay to the commissioner of revenue annually an excise tax, in addition to all other taxes, equal to four per cent (4%) of the net earnings for their next preceding fiscal year, from business done within the state; provided, however, net earnings shall not include dividends received from any other corporation paying excise tax under the provisions of this chapter, where such other corporation is a wholly owned subsidiary of the taxpayer; provided further, that all entities enumerated hereinabove and taxable under this section may carry their current year's losses forward two (2) years in computing net income subject to said tax.

Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing business within this state, without domesticating or qualifying to do business in this state, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter.

Any corporation organized under the laws of the state of Tennessee whose sole expressed corporate purpose is

for the furthering of industrial development in communities throughout the state, and doing related matters thereto, and whose stockholders receive no income other than interest or dividends on money invested in said corporation for constructing industrial buildings and whose officers receive no compensation shall be exempt from the payment of franchise and excise taxes.

67-2702. State purposes only.—The tax herein imposed is a state tax for state purposes only and no county or municipality or taxing district shall have power to levy any like tax.

67-2703. Additional to other taxes—Exceptions.—The tax here imposed shall be in addition to all other taxes, and no other tax shall be a credit upon the tax hereby imposed except as provided by Section 56-421, and except that all sums paid by state banks into the state treasury as fees for the use and benefit of the state banking department shall be a credit upon the tax hereby levied.

67-2704. Corporations owning lodge meeting places.—Corporations organized for the purpose of erecting, owning or operating a common meeting place for more than one (1) Masonic Lodge, more than one (1) lodge of Odd Fellows, or similar lodges, and which corporations could obtain general welfare charters, and in which corporations all the stock is owned by lodges participating in the common temple or meeting place, shall not be liable for the tax imposed by Section 67-2701, regardless of the type of charter held by said operating corporations, except on income received by said corporation as rentals for use for commercial purposes.

67-2705. Deduction for federal or foreign tax not permitted.—In computing the net earnings subject to excise taxation under this chapter there shall be no deduc-

tion for any taxes on, or according to, or measured by income, profits, earnings, or excess profits imposed by authority of the government of the United States of America, or by authority of any foreign government.

67-2706. Apportionment for corporations doing business outside state.—In the case of corporations, cooperatives, joint-stock associations and business trusts doing business in Tennessee and elsewhere the net earnings shall be apportioned as hereinafter set forth and the net earnings thus apportioned to Tennessee shall be deemed to be the earnings arising from business done within the state and shall be the measure of this tax. Such method of apportionment shall be as set forth in Sections 67-2707—67-2712.

67-2710. Apportionment on basis of gross receipts or net earnings.—If the principal business is other than the manufacture or sale of tangible property, or that of a common carrier of persons or property for hire, such proportion as its gross receipts in Tennessee during the income year is to its gross receipts for such year within and without the state.

In the event all or part of a corporation's business in this state is constructing, or improving real property for others, the measure of the tax shall be a combination of the earnings arising from a separate accounting basis maintained on construction operations plus the apportioned earnings from all other operations as derived by the provisions of Section 67-2706.

67-2711. Variation from standard apportionment formulas.—If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this state, because of peculiar or unusual circumstances inherent in a particular case and

create a hardship or injustice, the commissioner, upon application of the taxpayer and upon such showing, is authorized with the approval of the attorney-general, to adopt such other method of allocation and apportionment as would be fair and just under the facts of the case.

Provided, however, that when such other method of apportionment has once been established it shall continue in effect so long as peculiar or unusual circumstances remain substantially unchanged.

In the event of federal legislation that would proscribe present Tennessee statutory formulas the commissioner of revenue, with the approval of the attorney-general, may adopt such alternate formulas as would be consistent with the federal legislation.

67-2712. Apportionment of insurance companies' earnings.—Tennessee insurance companies shall pay on net earnings proportioned to premiums on policies on persons and property in this state.

67-2713. Administration by department of finance and taxation.—The supervision and collection of the tax imposed shall be under the direction of the department of finance and taxation, and such department shall have authority and power to prescribe forms upon which corporations and joint-stock associations, liable for the tax imposed, shall make reports of such facts and information as will enable the commissioner of said department to ascertain the correctness of the amount reported and paid by such corporations or joint-stock associations.

67-2714. Access to books and records. Said commissioner shall have access to all books and records of all such corporations and joint-stock associations to enable him to ascertain the correctness of any fact or report made or herein required.

67-2715. Finality of commissioner's decisions.—In all matters requiring the exercise of judgment and discretion as to what may or may not be net earnings, the judgment and opinion of said commissioner shall be final and conclusive and there shall be no review of his action except that the taxpayer shall have the right to pay any such tax under protest and to sue for the recovery thereof or the recovery of a part thereof under Sections 67-2303—67-2312.

67-2716. Date payment due—Penalty—Extension of time.—All reports must be filed with the commissioner of revenue on or before the first day of the fourth month following the close of taxpayer's fiscal year. The tax must be paid to the department of revenue at the time of filing the report.

Any corporation delinquent in the filing of the report herein required or in payment of the tax herein levied shall pay a penalty of ten per cent (10%) for the first month or fractional part thereof of delinquency, and penalty thereafter at the rate of one-half of one per cent (½%) of the amount due for each month of such delinquency.

Provided, that the commissioner of revenue shall have authority in the exercise of his discretion, for good cause shown, to grant an extension of time to the taxpayer to file report and pay the tax herein imposed, without penalty attaching, but the tax shall bear interest as herein provided from due date until paid. The penalties as herein provided shall be paid by the taxpayer unless the tax and interest thereon shall be paid on or before the expiration date of the extension.

67-2717. Suits for collection of tax.—Said commissioner may, in the name of the state of Tennessee, institute

suit or suits for the collection of said tax or any part thereof and for the penalty and interest imposed.

67-2718. Issuance of distress warrant.—The commissioner of revenue is empowered, and it shall be his duty, to issue a distress warrant for the collection of the excise tax, interest and penalty due from any corporation delinquent for sixty (60) days. Said distress warrant may be addressed and delivered to the sheriff of the county wherein such delinquent corporation has its principal office or place of business in Tennessee, or to the sheriff of any county in which the commissioner has reason to believe property of such delinquent corporation may be found.

The commissioner of revenue is empowered and it shall be his duty to issue a distress warrant against any officer or stockholder of a corporation which has dissolved or has been liquidated and has refused or failed to pay excise taxes due the state, said warrant to be in an amount equal to unpaid excise tax, penalty and interest owed by such corporation.

67-2719. Execution of warrant on personal property.—The sheriff into whose hands such warrant may come, or his deputy, may execute same by distraint and sale of personal property belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation, and the proceedings in respect thereto shall be the same as are provided by law for proceedings under an execution at law from a court of record; and the executing officer shall be entitled to the same fees, commissions, and necessary expense of removing and keeping property distrained as in case of an execution from a court of record.

67-2720. Levy of warrant on realty.—If the officer cannot find personal property to satisfy said distress war-

rant, he may levy same upon any real estate in his county belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation; and if levied on land, said distress warrant, together with the officer's return thereon, shall be returned to the circuit court of the county wherein the land lies, and the land shall be condemned and sold under the orders of said circuit court in the same manner as in case of the levy on land of an execution issued by a justice of the peace.

67-2721. Rules and regulations.—The commissioner of finance and taxation is authorized to make and promulgate rules and regulations, not inconsistent with this chapter, for the purpose of carrying out the provisions of this chapter, which rules and regulations, when approved by the attorney-general, and when promulgated and published, shall have the force and effect of law.

67-2722. Expenses of administration.—Said commissioner may expend so much of two and one-half per cent (2½%) of the amount received hereunder each year as may be necessary to defray the expenses and cost of litigation arising in the administration of this chapter.

67-2723. Penalties for failure to make reports or pay tax.—The willful failure or refusal of any corporation or joint-stock association to pay the tax or make reports as hereinabove required shall be a misdemeanor and subject it to a fine of not less than ten dollars ($10.00) nor more than one thousand dollars ($1,000).

67-2724. Use of information from returns.—Except in accordance with proper judicial order or as otherwise required by law, it shall be unlawful for the commissioner of finance and taxation, and deputy, agent, clerk, or other officer or employee to make known in any manner

the amount of income or any particulars set forth in any report or return required under this chapter; provided, nothing herein shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns and the items thereof; or the use of such reports or returns by legal representatives of the state in any suit or suits for the collection of said tax or any part thereof, or for the penalty and interest imposed by this chapter. A violation of any of the provisions of this section shall be a misdemeanor punishable by fine of not exceeding one thousand dollars ($1,000), or by imprisonment not exceeding one (1) year, or both, at the discretion of the court; provided, however, the commissioner of finance and taxation may permit the commissioner of internal revenue of the United States or the proper officer of any state imposing a tax similar to that imposed by this chapter, or the authorized representative of either such officer, to inspect the tax return of any corporation, or may furnish to such officer or to his authorized representative an abstract of the return of any corporation or supply him with information concerning any item contained in any return or disclosed by the report of any investigation of any return; but such permission shall be granted or such information furnished to such officer or his representative, only if the statutes or regulations of the United States or of such other state, as the case may be, grant substantially similar privileges to the governor or the proper officers of this state charged with the administration of this chapter.

APPENDIX D.

PROVISIONS OF TENNESSEE CODE ANNOTATED IMPOSING EXCISE TAX FOR TAXABLE YEARS 1965 AND 1966.

67-2701. Corporations subject to tax—Rate.—All corporations, cooperatives conducted for profit, joint-stock associations and business trusts, organized under the laws of this state, other than those organized for general welfare and not for profit, and all such entities organized under the laws of any other state or country for profit and doing business in Tennessee, shall, without exception, pay to the commissioner of revenue annually an excise tax, in addition to all other taxes, equal to four per cent (4%) of the net earnings for their next preceding fiscal year, from business done within the state; provided, however, net earnings shall not include dividends received from any other corporation paying excise tax under the provisions of this chapter, where such other corporation is a wholly owned subsidiary of the taxpayer; provided further, that all entities enumerated hereinabove and taxable under this section may carry their current year's losses forward two (2) years in computing net income subject to said tax.

Every such taxable entity organized and existing under and by virtue of the laws of this or any other state, territory or country, or organized and existing without any specific statutory authority, now or hereafter doing business within this state, without domesticating or qualifying to do business in this state, or while its charter is forfeited, revoked or suspended, shall as a recompense for the protection of its local activities and as compensation for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter.

Any corporation organized under the laws of the state of Tennessee whose sole expressed corporate purpose is

for the furthering of industrial development in communities throughout the state, and doing related matters thereto, and whose stockholders receive no income other than interest or dividends on money invested in said corporation for constructing industrial buildings and whose officers receive no compensation shall be exempt from the payment of franchise and excise taxes.

67-2702. State purposes only. The tax hereby imposed is a state tax for state purposes only and no county or municipality or taxing district shall have power to levy any like tax.

67-2703. Additional to other taxes. Exceptions. The tax here imposed shall be in addition to all other taxes, and no other tax shall be a credit upon the tax hereby imposed except as provided by Section 56-421, and except that all sums paid by state banks into the state treasury as fees for the use and benefit of the state banking department shall be a credit upon the tax hereby levied.

67-2704. Corporations owning lodge meeting places. —Corporations organized for the purpose of erecting, owning or operating a common meeting place for more than (1) Masonic Lodge, more than (1) lodge of Odd Fellows, or similar lodges, and which corporations could obtain general welfare charters, and in which corporations all the stock is owned by lodges participating in the common temple or meeting place, shall not be liable for the tax imposed by Section 67-2701, regardless of the type of charter held by said operating corporations, except on income received by said corporation as rentals for use for commercial purposes.

67-2705. Deduction for federal or foreign tax not permitted.—In computing the net earnings subject to excise taxation under this chapter there shall be no deduction

for any taxes on, or according to, or measured by income, profits, earnings, or excess profits imposed by authority of the government of the United States of America, or by authority of any foreign government.

67-2706. Apportionment for corporations doing business outside state.—In the case of corporations, cooperatives, joint-stock associations and business trusts doing business in Tennessee and elsewhere the net earnings shall be apportioned as hereinafter set forth and the net earnings thus apportioned to Tennessee shall be deemed to be the earnings arising from business done within the state and shall be the measure of this tax. Such method of apportionment shall be as set forth in Sections 67-2707—67-2712.

67-2710. Apportionment on basis of gross receipts or net earnings.—If the principal business is other than the manufacture or sale of tangible property, or that of a common carrier of persons or property for hire, such proportion as its gross receipts in Tennessee during the income year is to its gross receipts for such year within and without the state.

In the event all or part of a corporation's business in this state is constructing, or improving real property for others, the measure of the tax shall be a combination of the earnings arising from a separate accounting basis maintained on construction operations plus the apportioned earnings from all other operations as derived by the provisions of Section 67-2706.

67-2711. Variation from standard apportionment formulas.—If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this state, because of peculiar or unusual circumstances inherent in a particular case and

create a hardship or injustice, the commissioner, upon application of the taxpayer and upon such showing, is authorized with the approval of the attorney-general, to adopt such other method of allocation and apportionment as would be fair and just under the facts of the case.

Provided, however, that when such other method of apportionment has once been established it shall continue in effect so long as peculiar or unusual circumstances remain substantially unchanged.

In the event of federal legislation that would proscribe present Tennessee statutory formulas the commissioner of revenue, with the approval of the attorney-general, may adopt such alternate formulas as would be consistent with the federal legislation.

67-2712. Apportionment of insurance companies' earnings.—Tennessee insurance companies shall pay on net earnings proportioned to premiums on policies on persons and property in this state.

67-2713. Administration by department of finance and taxation.—The supervision and collection of the tax imposed shall be under the direction of the department of finance and taxation, and such department shall have authority and power to prescribe forms upon which corporations and joint-stock associations, liable for the tax imposed, shall make reports of such facts and information as will enable the commissioner of said department to ascertain the correctness of the amount reported and paid by such corporations or joint-stock associations.

67-2714. Access to books and records. Said commissioner shall have access to all books and records of all such corporations and joint-stock associations to enable him to ascertain the correctness of any fact or report made or herein required.

67-2715. Finality of commissioner's decisions.—In all matters requiring the exercise of judgment and discretion as to what may or may not be net earnings, the judgment and opinion of said commissioner shall be final and conclusive and there shall be no review of his action except that the taxpayer shall have the right to pay any such tax under protest and to sue for the recovery thereof or the recovery of a part thereof under Sections 67-2303—67-2312.

67-2716. Date payment due—Penalty—Extension of time.—All reports must be filed with the commissioner of revenue on or before the first day of the fourth month following the close of taxpayer's fiscal year. The tax must be paid to the department of revenue at the time of filing the report.

Any corporation delinquent in filing the report herein required or in payment of the tax herein levied shall pay a penalty of five per cent (5%) for the first month or fractional part thereof of delinquency, provided, however, that should the period of the delinquency exceed one (1) month the rate of penalty will be an additional five per cent (5%) for the second month or fractional part thereof and penalty thereafter at the rate of one-half of one per cent (½ of 1%) per month of the amount of tax due. All delinquency shall bear interest at the rate of six per cent (6%) per annum from due date until paid. The penalty and interest herein provided for shall apply to any part of the tax unpaid by due date and no such penalty or interest can be waived.

Provided, that the commissioner of revenue shall have authority in the exercise of his discretion, for good cause shown, to grant an extension of time to the taxpayer to file report and pay the tax herein imposed, without penalty attaching, but the tax shall bear interest as

herein provided from due date until paid. The penalties as herein provided shall be paid by the taxpayer unless the tax and interest thereon shall be paid on or before the expiration date of the extension.

67-2717. Suits for collection of tax.—Said commissioner may, in the name of the state of Tennessee, institute suit or suits for the collection of said tax or any part thereof and for the penalty and interest imposed.

67-2718. Issuance of distress warrant.—The commissioner of revenue is empowered, and it shall be his duty, to issue a distress warrant for the collection of the excise tax, interest and penalty due from any corporation delinquent for sixty (60) days. Said distress warrant may be addressed and delivered to the sheriff of the county wherein such delinquent corporation has its principal office or place of business in Tennessee, or to the sheriff of any county in which the commissioner has reason to believe property of such delinquent corporation may be found.

The commissioner of revenue is empowered and it shall be his duty to issue a distress warrant against any officer or stockholder of a corporation which has dissolved or has been liquidated and has refused or failed to pay excise taxes due the state, said warrant to be in an amount equal to unpaid excise tax, penalty and interest owed by such corporation.

67-2719. Execution of warrant on personal property.—The sheriff into whose hands such warrant may come, or his deputy, may execute same by distraint and sale of personal property belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation, and the proceedings in respect

thereto shall be the same as are provided by law for proceedings under an execution at law from a court of record; and the executing officer shall be entitled to the same fees, commissions, and necessary expense of removing and keeping property distrained as in case of an execution from a court of record.

67-2720. Levy of warrant on realty.—If the officer cannot find personal property to satisfy said distress warrant, he may levy same upon any real estate in his county belonging to such delinquent corporation, or which any officer or stockholder of the corporation may have acquired from said dissolved or liquidated corporation; and if levied on land, said distress warrant, together with the officer's return thereon, shall be returned to the circuit court of the county wherein the land lies, and the land shall be condemned and sold under the orders of said circuit court in the same manner as in case of the levy on land of an execution issued by a justice of the peace.

67-2721. Rules and regulations.—The commissioner of finance and taxation is authorized to make and promulgate rules and regulations, not inconsistent with this chapter, for the purpose of carrying out the provisions of this chapter, which rules and regulations, when approved by the attorney-general, and when promulgated and published, shall have the force and effect of law.

67-2722. Expenses of administration.—Said commissioner may expend so much of two and one-half per cent (2½%) of the amount received hereunder each year as may be necessary to defray the expenses and cost of litigation arising in the administration of this chapter.

67-2723. Penalties for failure to make reports or pay tax.—The willful failure or refusal of any corporation or joint-stock association to pay the tax or make re-

ports as hereinabove required shall be a misdemeanor and subject it to a fine of not less than ten dollars ($10.00) nor more than one thousand dollars ($1,000).

67-2724. Use of information from returns.—Except in accordance with proper judicial order or as otherwise required by law, it shall be unlawful for the commissioner of finance and taxation, and duty, agent, clerk, or other officer or employee to make known in any manner the amount of income or any particulars set forth in any report or return required under this chapter; provided, nothing herein shall be construed to prohibit the publication of statistics, so classified as to prevent the identification of particular reports or returns and the items thereof; or the use of such reports or returns by legal representatives of the state in any suit or suits for the collection of said tax or any part thereof, or for the penalty and interest imposed by this chapter. A violation of any of the provisions of this section shall be a misdemeanor punishable by fine of not exceeding one thousand dollars ($1,000), or by imprisonment not exceeding one (1) year, or both, at the discretion of the court; provided, however, the commissioner of finance and taxation may permit the commissioner of internal revenue of the United States or the proper officer of any state imposing a tax similar to that imposed by this chapter, or the authorized representative of either such officer, to inspect the tax return of any corporation, or may furnish to such officer or to his authorized representative an abstract of the return of any corporation or supply him with information concerning any item contained in any return or disclosed by the report of any investigation of any return; but such permission shall be granted or such information furnished to such officer or his representative, only if the statutes or regulations of the United States or of such other state,

as the case may be, grant substantially similar privileges to the governor or the proper officers of this state charged with the administration of this chapter.

APPENDIX E.

OPINION OF THE 19th JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, IN COLONIAL PIPELINE COMPANY vs. ASHTON J. MOUTON, COLLECTOR OF REVENUE.

(Filed June 7, 1968.)

The court will not go into detail about the issues involved and the facts as shown by the record in this case except to say that in 1963 the Collector of Revenue of the State of Louisiana made a proposed assessment of a corporation franchise tax against this plaintiff, and this plaintiff paid the proposed assessment under protest with notice of its intention to bring suit for a refund of the amount so paid. Briefly stated the facts dealing with the operation of this plaintiff are that it operates as a common carrier a pipeline from at or near Houston, Texas to Linden, New Jersey, which is a part of the greater New York area. This pipeline passes through several states. The facts show that it transports liquid fuels only. It does not transport any natural gas nor does it transport crude oil. It receives these products chiefly from the State of Texas and the State of Louisiana with minimal additions in the State of Mississippi. From that point on up to the northeastern terminal of the pipeline it distributes these products. There is no evidence of any incidents where plaintiff received any product in Louisiana and distributed the same product in Louisiana. Therefore, it is beyond any shadow of a doubt engaged only in interstate commerce. There is considerable testimony in the

record, testimony and documentary evidence dealing with the construction of this pipeline and dealing with the installation of stations along the line. It has been shown that this corporation qualified to do business in Louisiana in interstate commerce, and it is suggested and is probably true that this was done to facilitate the right of expropriation for rights of way. Louisiana, more particularly the City of Baton Rouge, is headquarters for the western division of this pipeline, there being further up the line a central division and then an eastern division. The western division is composed of that part of the pipeline in the State of Texas, all of it that is in the State of Louisiana, all of it that is in the State of Mississippi, and to its station at Moundsville, Alabama, which is said to be near the City of Tuscaloosa. The general manager of the western division, Mr. Franklin B. Whitaker, Jr., was the chief witness in this case, in fact was the only witness who gave oral testimony. It does not seem necessary to undertake an elaboration of his testimony but it suffices to say that it bears out the conclusions that the court has reached in this case that anything and everything done by this corporation since its original entry into the State of Louisiana has been purely incidental to its business as a common carrier engaged solely in interstate commerce.

Among all the cases cited in memoranda and discussed in argument, the one case that stands out in the mind of the court is the case of *Memphis Natural Gas Company v. Stone,* cited in both memoranda and referred to by counsel for both parties in argument. The Supreme Court of the United States in that case held the Mississippi tax to be valid because the Supreme Court of the State of Mississippi had given an interpretation of its statute which met objections that had been before the court prior to that time, and held that the tax was levied on the enjoy-

ment by the corporation of the protection of the laws of the state and the powers, rights, privileges and immunities derived from that state. Such is not the language of the statute involved in this case. It levies this tax for the privilege of carrying on or doing business, the exercising of its charter or the continuance of its charter within this state. In this court's opinion where the record shows as it does in this case that the privilege of carrying on or doing business is here limited strictly to the privilege of carrying on or doing an interstate business, the exercising of its charter or the continuance of its charter within this state deals with a charter of a corporation that is strictly engaged in interstate commerce. There is the difference between the Mississippi statute and the statute here before us.

One thing in connection with Mr. Whitaker's testimony in this case that I tried to think of a moment ago and couldn't remember it, and I think it is probably of considerable significance, he said that Colonial has never owned any interest in the products that it moves through its pipelines. I must say at the moment I cannot see any great importance in that, but that is a part of the record in the case, that it is strictly limited to the transportation of products owned by others.

To sum it up, it is the opinion of this Court that the imposition of this tax to facts found in this case is unconstitutional in that it violates the commerce clause of the Constitution of the United States.

There is therefore judgment in favor of this plaintiff for the amount sued for, that is, the refund of the tax heretofore paid to the defendant under protest.

COLEMAN LINDSEY,
Judge.

May 20, 1968.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

MID-VALLEY PIPELINE CO. *v.* KING, COMMISSIONER OF REVENUE, ET AL.

APPEAL FROM THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION.

No. 756. Decided January 13, 1969.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE STEWART and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted.